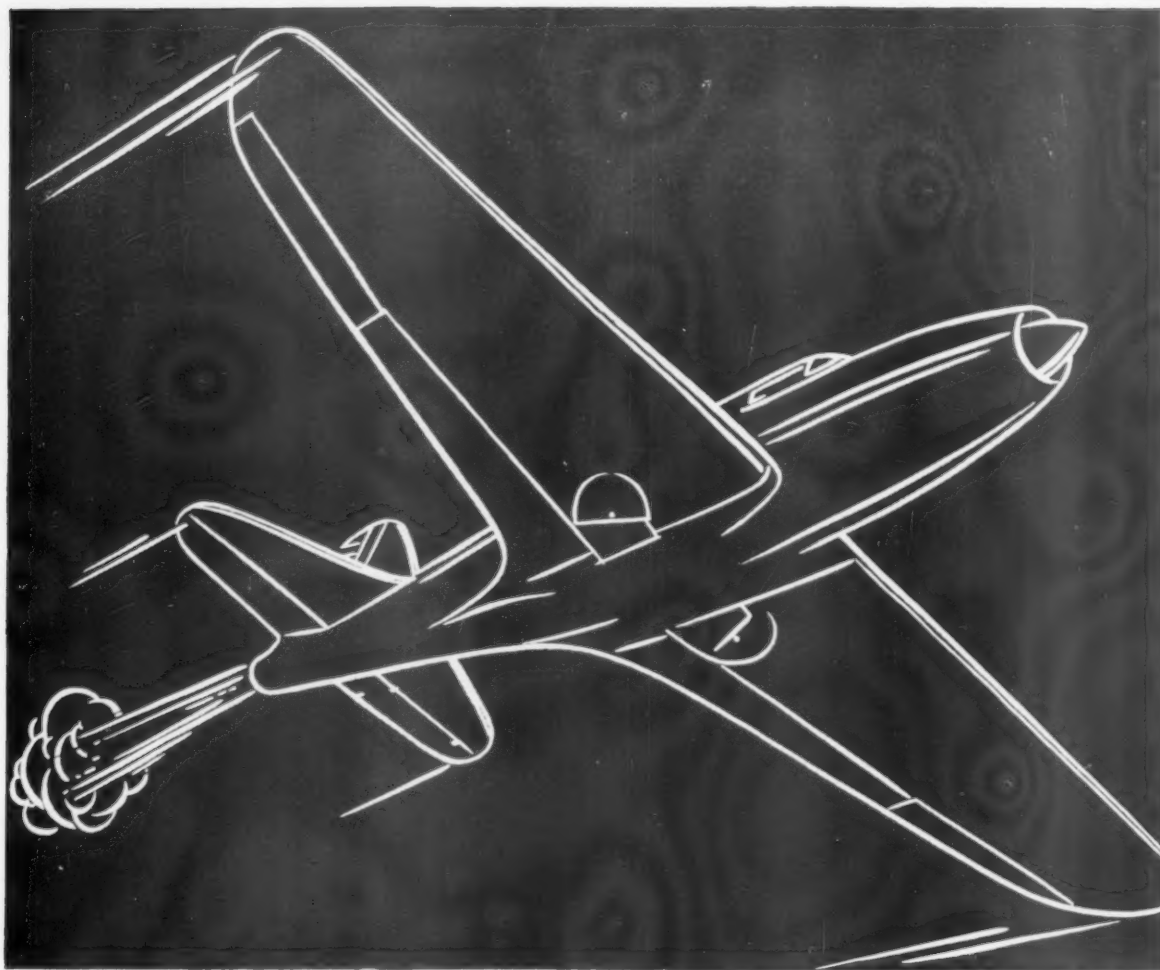




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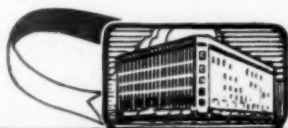
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Contents

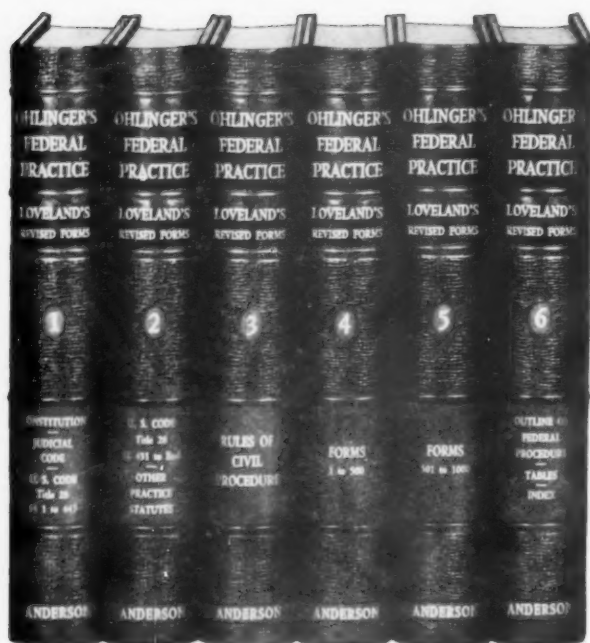
In This Issue	IV	Lawyer Veterans Look to the Bar for Refresher Programs	461
The World Court—the Next Step	443	Announcement to Members	462
<i>Manley O. Hudson</i>		The General Lawyer's Stake in Our Patent Law ...	463
Mr. Justice Sutherland	446	<i>Frederic B. Schramm</i>	
<i>Honorable Harold M. Stephens</i>		Editorials	464
The Charter of the International Military Tribunal	454	Review of Recent Supreme Court Decisions	468
Further Action on United Nations Charter	457	<i>Edgar Bronson Tolman</i>	
<i>Mitchell B. Carroll</i>		"Books for Lawyers"	479
James Francis Byrnes	459	Practising Lawyer's Guide to the Current Law Magazines	483
		Opinions of Professional Ethics Committee	486
		Bar Association News	491
		Inter-American Bar Association Meeting	493
		Tax Notes	494
		Letters to the Editors	495

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In THIS ISSUE

Our Cover

The portrait of the new Secretary of State is our cover for this issue. A sketch of his life and services appears on pages 459 and 460.

The World Court

Judge Manley O. Hudson contributes to this issue a cogent article giving the background of S. Res. 160, introduced by Senator Wayne L. Morse on July 28, which would recommend that the President proceed to make a declaration accepting the compulsory jurisdiction of the Court over legal disputes.

Mr. Justice Sutherland

Associate Justice Harold M. Stephens, of the U. S. Court of Appeals, Washington, D. C., has written a study of the life of Mr. Justice Sutherland. This paper was read as a part of the proceedings of the Bar and Officers of the Supreme Court in memory of George Sutherland, December 18, 1944.

Charter of the International Military Tribunal

Every student of international law and those interested in the coming trials of war criminals should turn to page 454 and read this Charter. Its new concepts are history-making.

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We are receiving many inquiries as to refresher courses for lawyers who have been released from the services. Information regarding these courses is printed on pages 461-462.

Review of Supreme Court Decisions

Among the many important cases reviewed, special attention should be given to the following:

The *Bridges* case brings to an end a long controversy as to whether Bridges was a member of the Communist party and whether he could lawfully be deported.

The *Jewell Ridge* case follows and reinforces the *Tennessee Coal Co.* case holding that underground travel in the mines there involved is "work" and therefore compensable.

The *Borden* case holds that elevator operators, janitors and other employees of an office building, occupied for the superintendence, management and administration of a milk producing company, are engaged in the production of goods, but the contrary result was obtained in the *East 40th Street Building* case.

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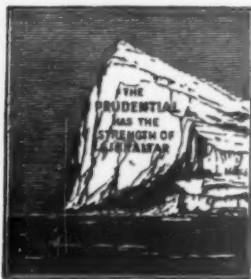
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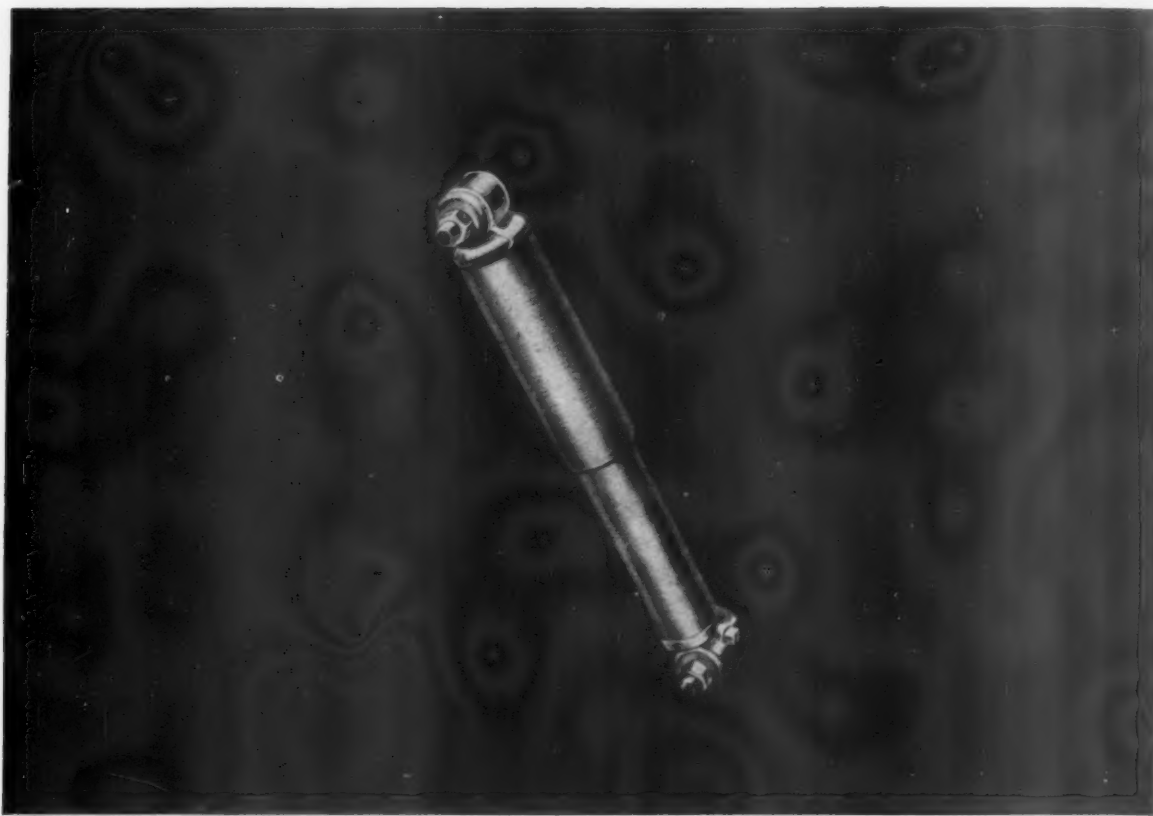
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And oft be called A J,
Unless he gets what L P can
Obtain in N E way.

Every D D does is watched,
And every K C tries;
He can't succeed with M T shelves
B E so very wise.

U C he must be up to date,
Or L C cannot try
To C K place among the few
Who R A counted high.

Now if this N D has in view,
And such he would S A,
Rather than buy X S of books,
Let him have L.R.A.

Translation of Capitals used:

line 1, easy	line 6, case he	line 11, help he	line 16, are ac-
line 2, excel	line 7, empty	line 12, any	line 17, end he
line 3, aid he	line 8, be he	line 13, you see	line 18, essay
line 4, or he	line 9, seedy,	line 14, else he	line 19, excess
line 5, deed he	line 10, a jay	line 15, seek a	line 20, L.R.A.

¹ The above rhyme was written thirty years ago. Although its lesson deals with L.R.A., the distinguished predecessor of American Law Reports, it is even more apropos to the later publication since the mass of case law with which the lawyer deals is much greater today.

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The World Court—the Next Step

By Manley O. Hudson

A long road was turned on July 28, 1945, when at the request of President Truman the Senate of the United States voted,¹ by a majority of 89 to 2, to give its advice and consent to the ratification of "the Charter of the United Nations, with the Statute of the International Court of Justice annexed thereto." This means that the United States of America is now prepared to work with other States toward the shaping of an organized world.

Before the Charter can enter into force, ratifications must be deposited in Washington by China, France, Great Britain, the Soviet Union and the United States, and by a majority of the other forty-five signatories. Yet its entry into force will not in itself attain the goal we have in mind, it will only create a series of international institutions through which, if the peoples of the world have the wisdom and the will, the results which we desire from time to time may be accomplished.

What is our goal? Above all, peace. Not a peace imposed by might, but a peace which rests upon the solid foundation of justice. And to lawyers at any rate that peace is possible only if justice can be administered according to law. An organized world cannot exist without organized justice.

Lineal successor to the Permanent Court of International Justice, the new International Court of Justice will inherit its high tradition. The continuity has been in some degree interrupted, but it has not been broken. Few changes have been made in the 1920 Statute of the Permanent Court.² Hence experience is at hand for shaping the new Court's administration and procedure. And there is no reason for an-

ticipating delay in its functioning, once the Statute has been brought into force.

What, then, will the new Court have to do? To adjudicate, it must have jurisdiction. Of course States can agree at the time to carry their disputes before it. Yet it is highly important that they should agree in advance.

Fortunately the new Court will be invested with some of the old Court's jurisdiction in advance. So far as Members of the United Nations are concerned, international treaties and conventions expressly conferring jurisdiction on the Permanent Court will in future be deemed to confer the same jurisdiction on the International Court. The United States is a party to only one such instrument—the Constitution of the International Labor Organization. While the jurisdictional provisions in that Constitution are quite broad in scope, no dispute has arisen during twenty-seven years to call for their invocation by any State. It seems highly improbable, therefore, that the Court will often be called upon to exercise jurisdiction coming from this source, and some question may arise, also, because a number of States which are not United Nations are members of the International Labor Organization.

In the past many American and Canadian lawyers have advocated the inclusion in the Court's Statute of a provision conferring a general obligatory jurisdiction over legal disputes. This course was suggested by the Committee of Jurists which drafted the Statute of the Permanent Court in 1920, but it was so stoutly opposed by some States that it was necessary to stop short of creating a general obligation for the States

parties to submit to the jurisdiction. There was included, however, an optional provision under which States desiring to do so could, as among themselves, invest the Court with jurisdiction over defined classes of legal disputes. This provision proved very fruitful. Of the fifty-one States which became parties to the Statute, forty-five exercised the option and made declarations giving the Court compulsory jurisdiction. Most of these declarations were subject to reservations, and were for limited periods of time. At one time, as many as forty-two declarations were in force. On eleven occasions, the Court was asked to exercise the jurisdiction thus conferred, and it did so in five cases without any untoward incident.³

This history engendered hopes that after the lapse of twenty-five years further progress might be achieved. Both in the Committee of Jurists at Washington and in the United Nations Conference at San Francisco, a majority of the delegations insisted that the jurisdiction be made obligatory for all of the parties to the Statute. This was not only the position taken by most of the smaller States; it also had the support in principle of some of the great States which have in the past made declarations accepting the Permanent Court's jurisdiction. Yet the step could have been taken only if all

1. When the vote was being taken, it was announced that four of the five Senators absent would have voted for the resolution if they could have been present, and that one would have voted against. 91 *Congressional Record* (1945), p. 8329. The division was therefore 93 to 3.

2. The more significant changes were explained by the writer, in the August number of this *Journal*.

3. See Hudson, *Permanent Court of International Justice, 1920-1942*, p. 481.

States agreed, and some delegations, including that of the United States, foresaw difficulties which led them to hesitate. It was therefore impossible to go beyond the existing situation, and the new Statute merely continues in Article 36, with slight modification, the optional provision in the old Statute. The San Francisco Conference expressed the hope, however, that States would proceed promptly to make declarations with reference to the obligatory jurisdiction of the new Court.

Declarations made by twenty-seven States under Article 36 of the Statute of the Permanent Court are still in force. When that Statute is replaced by the new Statute, a provision in the latter will make such declarations of the United Nations applicable to the new Court. This means that from the start the new Court will have compulsory jurisdiction with respect to legal disputes between twenty States, viz., Australia, Bolivia, Brazil, Canada, Colombia, Denmark, Dominican Republic, Great Britain, Haiti, India, Iran, Luxembourg, Netherlands, New Zealand, Nicaragua, Norway, Panama, El Salvador, South Africa and Uruguay.⁴ Unless further action is taken, the declarations made by Bulgaria, Finland, Ireland, Portugal, Sweden, Switzerland and Thailand will lapse when the Permanent Court ceases to exist.

Now what is the position of the United States in this regard?

The situation has changed greatly since we failed to join with other nations in maintaining the Permanent Court. That failure may be said to have been due primarily to two things—(1) a distrust of, in some quarters an opposition to, the League of Nations of which the United States was not a member, and (2) the non-payment of debts owed to the United States by certain European nations.⁵ Now the United States will be a member of the new league to be called the United Nations, and we may even be tempted to look askance at any nations which are not members of it. Now, also, the debt question fails to arouse our

animosities; new problems have arisen to dwarf it into popular insignificance.

During the period when we were considering the proposal that we should give our support to the Permanent Court, from 1923 to 1935, no official suggestion was made that we should also confer on it compulsory jurisdiction over our legal disputes. The only tentative along this line was the assurance given to other States by Secretary Hughes in 1923 that if the United States became a party to the Court's Statute, it would be willing to consider the revision of certain arbitration treaties to provide for reference of disputes to the Court.⁶ Yet under all of these arbitration treaties, a special agreement was required in every particular case, so that even if the condition specified had been met the assurance might have fallen short of the compulsory jurisdiction contemplated in Article 36 of the Statute.

Our national temper seems to be such that we can take great pride in our record with respect to the adjudication of international disputes, can acclaim our leadership,⁷ can emphasize our example to other States, can adjure other States to move forward, and yet be content to pay little heed to the advances which other States have made.

The truth of the matter is that while we were in the vanguard in the nineteenth century, we have not kept that relative position in this century. We did go forward to use and to encourage the use of the Permanent Court of Arbitration. Yet when we ratified the 1907 Hague Convention on Pacific Settlement, we attached a reservation requiring a special agreement in each case unless a treaty should provide otherwise. In the series of arbitration treaties concluded with certain other States in 1908-1909, we employed a British-French formula of 1903 excluding from the obligation to arbitrate, questions affecting the vital interests, the independence or the honor of the parties. Both in 1904 and in 1911, the Senate thwarted the

conclusion of treaties of somewhat more ample scope. Then came the "Bryan treaties," which registered some advance, though they did not relate to arbitration or adjudication; but no dispute was ever referred to any of the permanent commissions for which they provided. In 1928, we concluded a new series of arbitration treaties which failed to take account either of the existence of the Permanent Court or of the advance made in such treaties between other nations; these treaties provided for a special agreement in each case, for which the Senate should give its advice and consent. We signed the Inter-American Arbitration Treaty in 1929, but we did not ratify it until six years later, after some other States had accomplished that formality; this, too, required the creation of an *ad hoc* tribunal and a special agreement in each particular case, and in consenting to its ratification the Senate stipulated for its consent.

If our position be compared with that of a number of other States, it hardly entitles us to claim the leadership. We have, in fact, fallen behind. For more than forty years we have been stymied by the Senate tradition which requires that our obligation with reference to the arbitration of disputes be subject to the requirement for each particular case of a special agreement consented to by the Senate with "two-thirds of the Senators present concurring." If that tradition is still to hold sway, the United States cannot confer on the International Court of Justice compulsory jurisdiction, the essence of which is that one State should be

4. Disputes between the members of the British Commonwealth of Nations are not covered.

5. These were the factors in the background. The numerous technical questions on which discussion centered were of relatively slight importance.

6. See U. S. Foreign Relations, 1923, II, pp. 16, 316, 511, 630, 753. Similar assurance was given in 1924 with reference to a liquor treaty. *Idem*, 1924, I, p. 211.

7. Senator Lucas told the Senate on July 25 "that the world understands the leading position of the United States throughout its history in advocating the judicial settlement of international disputes." 91 Cong. Record, p. 8156.

able to proceed against another without the latter's consent at the time. Yet the march of events has now brought us face to face with the question of the Court's jurisdiction.

In the Senate debate on the Charter, the Statute of the Court was relegated to a minor place.⁸ Reading the report in the Congressional Record, one would hardly suppose that only a few years ago what was in substance this same Statute had excited the ire and foreboding of more than one-third of the Senate. Numerous references were made to the fact that the United States is not required to submit to the Court's jurisdiction. The question was raised as to the manner in which a declaration accepting compulsory jurisdiction on behalf of the United States might be made, it being feared, apparently, that the President might make the declaration without seeking in advance the advice and consent of the Senate. "To avoid any possibility of misunderstanding," Senator Vandenberg addressed to the Legal Adviser of the Department of State the question, "Who would make this decision and how?" Mr. Hackworth's excellent memorandum in reply⁹ stated that "if the Executive should initiate action to accept compulsory jurisdiction of the Court under the optional clause contained in article 36 of the statute, such procedure as might be authorized by the Congress would be followed and if no specific procedure were prescribed by statute, the proposal would be submitted to the Senate with request for its advice and consent to the filing of the necessary declaration with the Secretary General of the United Nations." Though in submitting the Charter to the Senate the President had made no proposal concerning the Court's compulsory jurisdiction, a few Senators expressed themselves as favoring its acceptance.

On the last day of the debate, it remained for Senator Morse to make the one speech dealing at length with the Court, and to take the only initiative in the direction of compulsory jurisdiction. He had de-

clared on July 27 that "if we really mean to keep faith with the Charter, if we really mean to carry out what so many have said on the Senate floor during the past few days, we must agree to the compulsory jurisdiction of the World Court."¹⁰ On July 28, he offered the following resolution "for early consideration and action:"¹¹

RESOLVED, That the Senate hereby recommends that the President of the United States deposit with the Secretary General of the United Nations, whenever that official shall have been installed in office, a declaration under paragraph 2 of article 36 of the Statute of the International Court of Justice recognizing as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes hereafter arising concerning:

- a. The interpretation of a treaty;
- b. Any question of international law;
- c. The existence of any fact which, if established, would constitute a breach of an international obligation; and
- d. The nature or extent of the reparation to be made for the breach of an international obligation.

PROVIDED, That such declaration should be for a period of not to exceed 5 years, and should exclude from its operation:

- a. Disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method of pacific settlement; and
- b. Disputes with regard to questions which by international law fall exclusively within the jurisdiction of the United States.

PROVIDED FURTHER, That the President be and hereby is requested to furnish the Senate for its information a copy of any declaration filed by him pursuant to this resolution.

This resolution, referred to the Senate Committee on Foreign Relations, now spearheads the next step for the United States to take. The text might perhaps be improved. Five years are a short period, and uncertainty as to renewal is always disturbing. Can't we go as far as Canada went in its declaration of 1929, still in force, when it accepted the

jurisdiction "for a period of ten years and thereafter until such time as notice may be given to terminate the acceptance?" Colombia, the Dominican Republic, Haiti, Nicaragua, Panama, El Salvador and Uruguay placed no time-limit on the duration of their declarations.

There may have been some exaggeration in Senator Taft's declaration, after expressing the hope that "all the nations ultimately come to be willing to submit all their disputes to arbitration or adjudication by an impartial tribunal," that "America must set the example." The example has already been set by other nations. Yet if the Court is to have adequate jurisdiction, many more nations must still act to confer it, and their course may be influenced by what the United States decides to do. If, since 1920 when other nations adopted the Statute of the Permanent Court, we have not led the movement which previously we had helped to sponsor, we now have an opportunity to push it on. We can offer encouragement to those who would participate in it. We can assure the world that we mean business in our heraldry of justice according to law as a basis of peace.

Of course the conferring of jurisdiction must be distinguished from its exercise. If the new Court should not have much to do in the years immediately before us, this need be no cause for discouragement. Peoples everywhere can take satisfaction in its availability. From the outset it will have the formal support of a large number of States. From the outset it will have an extensive jurisdiction. What remains is for the United States and other nations to give it vitality as a "principal organ" of the United Nations.

8. Only bare references to it were made by Senator Connally and Senator Vandenberg in opening the debate; Senator Barkley said, "We all understand the jurisdiction of the International Court of Justice. I am glad that it has been made a part of this Charter so that we are not required to debate its virtues and its advantages separately from some other agreement."

9. 91 *Congressional Record*, p. 8249.

10. 91 *Congressional Record*, p. 8247.

11. *Ibid.*, p. 8304. The resolution became S. Res. 160.

Mr. Justice Sutherland

By Honorable Harold M. Stephens

ASSOCIATE JUSTICE, U. S. COURT OF APPEALS, WASHINGTON, D. C.

George Sutherland was born on the old Roman road known as Watling Street, in the little town of Stoney Stratford on the banks of the River Ouse, in Buckinghamshire, England, on March 25, 1862, of Scotch-English ancestry. His father and mother came to America and were naturalized in Utah during his infancy. In that day the people of Utah were poor, struggling to uproot the gray sage, to divert the mountain streams into orchards and fields, and to discover and open mines. Young Sutherland went to work at the age of twelve, first in a clothing store, later in a mining recorder's office, as agent for an express company, and for railroad contractors. But he attended the grammar schools, and for two years studied at Brigham Young University in Provo, Utah, under a stimulating scholar, Dr. Carl G. Maeser, who aroused the enthusiasm of the talented youth for intellectual pursuits. Sutherland spent one school year, 1882-3, at the University of Michigan Law School under Judge Thomas M. Cooley as Dean and Professor of Constitutional Law. He was admitted to the bar in Michigan and Utah in 1883, at the age of twenty-one, and at once commenced law practice at Provo, Utah—first with his father, who had himself read law and been admitted to practice, later with Samuel R. Thurman, the late Chief Justice of Utah, and William H. King, who but recently retired from the United States Senate.

Early Law Practice and Political Activity

In 1893 Sutherland moved to Salt Lake City and there practiced in association with other lawyers of

outstanding character and ability. He was especially inspired by his association with Judge Jabez G. Sutherland, author of the well-known works on statutory construction and on damages.¹ In that day the practice of law meant the trial of cases, and the riding of circuit, often on horseback, in the territorial courts. He was engaged in the important apex, trespass, and irrigation suits and in criminal cases. He won his first case, *People v. Miller*, 4 Utah 410 (1886), reversing, because of a faulty instruction, a conviction for grand larceny. His great native capacity for the law was speedily developed in this rugged Western arena. He early evidenced also a serious interest in government, which persisted throughout his life. His first political activity was as a member of the Liberal Party, an anti-church organization which contested with the pro-church Peoples Party, in the day before organization in Utah along national political lines. He was the candidate of this party for Mayor of Provo in 1890. But he helped to organize the Harrison and Morton Republican Club of central Utah; and in 1891, when the Republican Party of Utah came into existence, Sutherland attended as an alternate the National Republican Convention in Minneapolis; and he attended, as a delegate, the Conventions of 1904, 1908, 1912, and 1916. He served as a member of the Utah State Senate from 1896, the year of statehood, to 1900. As Chairman of the Judiciary Committee he sponsored the act which extended the right of eminent domain to the mining and irrigation industries so that tramways, canals and ditches might

be constructed for the development of the State.

Sutherland's first national service was as Representative from Utah in Congress for the years 1901-3. He aided in framing and passing the Reclamation Act under which vast areas of arid lands have been redeemed. He declined renomination, to return to the practice of law. But in 1905, after election by unanimous vote of the Utah Legislature, he commenced a twelve-year period of service in the United States Senate. There he was a member of the Coast and Insular Survey Committee and of the Committees on Indian Affairs; Irrigation, Mines and Mining; Revision and Codification of Laws; Public Buildings and Grounds; Suffrage; Judiciary; and Foreign Relations. His accomplishments were many, varied, and important: With Senator Heyburn of Idaho he sponsored the enactment of the first two titles to be completed of the revision of the penal laws of the United States; he actively supported the bill which enacted the Judicial Code and combined the jurisdiction of the district and circuit courts, abolishing the latter. As Chairman of the Congressional Commission investigating employers' liability and workmen's compensation, he laid the foundation for passage of the Federal Employers' Liability Act. He supported and aided in framing the Seventeenth Amendment. He championed women's rights and introduced and sponsored the Susan B. Anthony Resolution, although the Nineteenth Amendment was not submitted to

1. Judge Jabez G. Sutherland was related to Mr. Justice Sutherland by marriage to the latter's mother's sister, in 1896.

the states until after his retirement from the Senate. He aided in the passage of the Seamen's Act of 1915. Andrew Furuseth accredited its passage to Sutherland, and eulogized him as a friend of the American seaman.

Sutherland's interest in the science and art of government caused him to devote much time and energy to writing and speaking. When in 1911 the proposed constitutions of New Mexico and Arizona were before the Senate, he revealed, in a speech in opposition to the initiative, referendum and recall provisions, a ripe scholarship in the field of government and constitutional law and history; his address, a plea for representative democracy, is recognized as one of the ablest in the Senate's history. He distinguished himself when in 1916, as a member of the Foreign Relations Committee, he attacked the timid policy of the Government in respect of submarine warfare and the right of neutral citizens to travel or ship on armed belligerent merchant vessels. Perhaps his best known addresses outside the Senate are: "The Courts and the Constitution," before the American Bar Association in 1912;² "Private Rights and Government Control," his address as President of the Association in 1917;³ "The Supreme Allegiance," the Washington Birthday address at the University of Michigan in 1920;⁴ and "Principle or Expedient," delivered before the New York Bar Association in 1921.⁵ In 1918 he delivered a series of lectures under the Blumenthal Foundation at Columbia University, which later appeared in book form as "Constitutional Power and World Affairs," a treatise of recognized merit on the external powers of the Government.⁶

American Bar Association Activities

Following the entrance of the United States into the First World War, Sutherland devoted a substantial amount of his time to the war activities of the American Bar Asso-

ciation. As its President in 1917 he was recognized as a worthy member of a distinguished succession; his three immediate predecessors were Elihu Root, Peter W. Meldrim and William H. Taft. He continued active participation in the affairs of the Association after his retirement as President, serving on various standing committees. In 1918 at the meeting in Cleveland, while presiding over one of the sessions, he had occasion to introduce as the principal speaker Associate Justice John H. Clarke of the Supreme Court of the United States, whom he was to succeed on that tribunal. When the Bar Association members met with their English brethren in London in 1924, Sutherland replied for the Association to the Lord Chancellor's address of welcome.⁷

Retirement from the Senate and Law Practice in Washington

Sutherland engaged in the practice of law in Washington from 1917, when he retired from the Senate, to 1922, when he was appointed to the Supreme Court. He confined himself largely to appellate cases and to consultations involving law matters. He aided Commissioner Roper in the reorganization of the Bureau of Internal Revenue. He appeared several times in the Supreme Court; perhaps the most important of his cases was *New York Trust Company v. Eisner*, 256 U. S. 345 (1921), in which the constitutionality of the Federal Estate Tax was involved. He served with Colonel Henry W. Anderson of Richmond, Virginia, as

trustee, with the approval of the then Supreme Court of the District of Columbia (now the District Court of the United States for the District of Columbia) under the Armour and Swift Companies' plan for the disposal of their stockyards stock. He was chairman of the Advisory Committee of the United States delegation at the International Conference on the Limitation of Armament in 1921, and in 1922 was Counsel for the United States in an arbitration with Norway, participating in arguments before the Permanent Court of Arbitration at The Hague. It was on September 5 of that year, when in London on his return from The Hague, that his appointment to the Supreme Court by President Harding was announced.⁸

Opinions in the Supreme Court

During his fifteen and one-half years' service on the Court, Mr. Justice Sutherland wrote three hundred twenty opinions, of which two hundred ninety-five were majority, one a concurrence, and twenty-four dissents, and one decree in an original suit. He also wrote one opinion as Circuit Justice of the Second Circuit. Perhaps his most important opinions are: *Massachusetts v. Mellon*, 262 U. S. 447 (1923), holding that a taxpayer seeking to restrain on grounds of unconstitutionality the expenditure of public funds must show special injury; *Euclid v. Ambler Co.*, 272 U. S. 365 (1926), which recognized the basic constitutionality of zoning ordi-

but brought to all of us a realizing sense of kinship that will result in more firmly welding our friendship and bringing about a closer cooperation for our mutual good and the good of the world. . . . The hospitality of our English friends was overflowing and perfect—their welcome as outspoken as it was genuine. Forces of mutual good will were set in motion which must result in a community of lasting good fellowship for the advancement of those identical ideals of justice, private and public, which both of us have inherited and cherish."

8. Credit for the foregoing biographical information is extended to Mr. Alan E. Gray of Los Angeles. Mr. Gray was Mr. Justice Sutherland's law clerk during his earlier years on the bench and before that was his Senatorial secretary.

2. Report of the Thirty-fifth Annual Meeting of the American Bar Association held at Milwaukee, Wisconsin, August, 1912, pages 371-392.

3. Report of the Fortieth Annual Meeting of the American Bar Association, held at Saratoga Springs, New York, September, 1917, pages 197-214.

4. Unpublished.

5. Annual Address, New York State Bar Association, New York City, January 21, 1921.

6. Columbia University Lectures, George Blumenthal Foundation, 1918, Columbia University Press, 1919.

7. Sutherland wrote for the September-October 1924 issue of the West Publishing Company's *Docket*: "The London meeting not only revealed our English brethren as generous and charming hosts

nances; *United States v. MacIntosh*, 283 U. S. 605 (1931), ruling that one who conscientiously objects to bearing arms in the defense of the country cannot be naturalized; *Utah Power & Light Co. v. Pfof*, 286 U. S. 165 (1932), upholding a state tax upon the production of electricity notwithstanding that the same goes immediately into interstate commerce; *Powell v. Alabama*, 287 U. S. 45 (1932), sustaining under the due process clause of the Fourteenth Amendment the right of an accused to counsel in a criminal case in a state court; *Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 398 (1934), a dissent asserting invalidity of a state moratorium statute as violative of the obligation of contracts clause of the Constitution; *Humphrey's Executor v. United States*, 295 U. S. 602 (1935), deciding that the President, merely as such, does not have power to remove a member of an independent administrative agency; *Grosjean v. American Press Co.*, 297 U. S. 233 (1936), holding a state license tax on newspapers to be a previous restraint upon the press and a violation of the Fourteenth Amendment; *United States v. Curtiss-Wright Corp.*, 299 U. S. 304 (1936), declaring the powers of the Congress and the President in international affairs to be plenary; *Associated Press v. National Labor Relations Board*, 301 U. S. 103 (1937), a dissent urging that administrative control of the employment and discharge of editorial writers is an interference with freedom of the press contrary to the First Amendment.

Mr. Justice Sutherland retired January 18, 1938, and died July 18, 1942. He is survived by his wife, who was Miss Rosamond Lee of Beaver City, Utah; a daughter, Mrs. Walter A. Bloedorn, of Washington, D. C.; and two grandchildren.

Tribute can best be paid to Mr. Justice Sutherland by telling what he did, what he thought, how he wrote, and what kind of man he was. The principal events of his life have been described.

Ideas About Government

I shall refer now to his ideas about government and about the judiciary, and to his style of writing; I shall say something also—since it was my good fortune to know him—of his personal traits. Mr. Justice Sutherland's opinions, public utterances in the Senate, professional addresses and more personal papers disclose definite, articulated ideas on the subject of government. They are a measure of the man in spirit and mind.

Sutherland approached the problems of government with belief in a Supreme Being and in a universe operating according to "a great and good plan," under laws, moral, social and economic, which are the foundation of men's positive enactments. These underlying forces can no more be set aside than the law of gravitation—although, as with the latter, men may order their affairs providently under them. Man is endowed with spirit, conscience, reason, and a substantial power of self-direction; he is competent to discover objective truth and to apply it; apart from law and the state, he is possessed, from his very nature, of rights of life, liberty and the pursuit of happiness, and of the power to set up and operate governments to protect these rights. Thus Sutherland laid down as a cardinal principle that ultimate sovereignty is in the people. This he thought the animating principle of the Declaration of Independence. Sutherland thought, moreover, that government according to law is possible. He rejected the currently fashionable philosophical view that man's action is driven, not free, that there are no demonstrable truths, and that even if there are, man is incapable of rational application thereof to his affairs. In his youth in the West Sutherland had seen, in the stern struggle of men for a livelihood, the need of individual liberty; he had also seen defiance of law, and the need of order. He thought liberty and order the most precious possessions of man, and saw the essence of the problem of government in recon-

ciliation of the two: Order must not be sacrificed in the name of liberty, for that would be anarchy; liberty must not be lost in the name of order, for that would be despotism.

Within the democracies, in Sutherland's view, the rights of the individual are sufficiently safeguarded and the emphasis of effort now must be upon social needs—adequate wages, proper conditions of work, housing, public health, prevention of monopoly. But the good of society must always be consulted in terms of its living individual components, lest we govern in the interest of a fictitious entity. The social body is an organism of growing complexity, and change is an inevitable concomitant of growth. But alterations in government should be made in response to changed conditions, and in evolutionary rather than in abrupt manner.

Analysis of the Constitution

In Sutherland's analysis the Constitution had three objects—"the establishment of a system of government; . . . the institution of certain controlling political postulates, to which the operations of government must conform; . . . the fixation of certain well settled rights of a fundamental personal character, intended to safeguard the liberties of the individual against the operations of government itself."⁹ Sutherland looked upon the guarantee of personal liberties as the recognition of "certain natural rights enforced in the Constitution by prohibitions against any interference with them . . . * * * . . . the Constitution is resorted to not as supreme law for their enforcement, but as high proof of their existence and incontrovertible nature."¹⁰ The Constitution is the foundation of the state as a superstructure. Under the Constitution both the official and the citizen are beneath the law. The limitations and safeguards in the Constitution reflect that essence of self-government which is in self-restraint against laws or action which

9. *Constitutional Power and World Affairs*, *supra*, page 68.

10. *Id.* at pages 68, 69.

may be foolish or excessive, even though having the momentary support of the majority. The principles of the Constitution are living forces; it is not "a wall, but a wide, free flowing stream within whose ample banks every needed and wholesome reform may be launched and carried."¹¹ In the fervency of his belief Sutherland likened the Constitution to the multiplication table and the Sermon on the Mount, meaning that in his view the framers had winnowed from the knowledge and experience of mankind universal principles of self-government. Thus it was made for all time, has constancy of meaning, although variability in application, and must be obeyed.

Sutherland emphasized that it was intended that our government be a representative democracy. He thought it was as impossible, in so large and populous a country, for the people en masse to make and execute laws as for them en masse to compose music or manufacture shoes—that the details of government must be delegated. The initiative and referendum were attempts at government en masse and would weaken, he thought, the sense of responsibility of the legislator. Local self-government is a fundamental article in the American political faith. But state and national powers are not antagonistic, they are complementary; and in their balanced distribution support a political structure as nearly perfect as human ingenuity has been able to conceive. "The States are *politically* as well as *geographically* parts of one great governmental organism. To destroy or reduce the vitality of one of these parts would in the end reduce the strength of the whole, as the vigor of the human body is lessened by the loss or weakening of one of its limbs."¹² The separation of powers is not a mere form or convenience or expedient of governmental mechanics, but basic and vital. For free government comes to an end when the accountability of the individual to society may be fixed and adjudged by the same man or set of men—since that would come to mean that the individual would hold

his rights and liberty not under standing impartial laws but in conformity with special and changing opinions influenced by exigency or prejudice.

Dangers to Democracy

Sutherland warned against influences and tendencies which might, if unstemmed, undermine the foundation of democracy. The most dangerous was the decadence in religious belief. He understood that the Declaration and the Constitution make no sense unless man is accepted as the child of God. He thought that a government in business combines the incongruous functions of a sovereign seeking customers and a trader administering laws. He saw that while the magnitude and complexity of governmental tasks require the legislature to create commissions to fill in the details of the laws and to execute them, nevertheless vague statutes and inexplicit standards inevitably result in personalized government, the despotism of discretionary rulings by a myriad of officials; actual responsibility and theoretical power in the legislature, theoretical responsibility and actual power in the administrator. He noted, with concern, the expansion of bureaus, pointing out in 1921 that the Federal Civil Service rolls had grown from two hundred thousand to seven hundred thousand in the preceding six years. He deplored sumptuary legislation as unenforceable, and thought also that it produces disrespect for law and weakens the effect of self-convincing moral standards. The essence of law is that it shall operate generally—"equal justice under law"—hence special and class legislation are odious. Not the character of the actor but the quality of his act should be the test of culpability. "We cannot maintain a government of laws if the rights of some men are submitted to the test of liberty, and the rights of others to the test of power."¹³ Rash criticism of the Constitution and hasty, capricious laws are a threat to stability.

The Right to Life, Liberty and Property

There is a deal of nonsense and demagoguery, Sutherland said, in the warnings not to exalt property above the man. Under the due process clause, he pointed out, "it is not the right of property which is protected, but the right to property. Property, *per se*, has no rights; but the individual—the man—has three great rights, equally sacred from arbitrary interference: the right to his life, the right to his liberty, the right to his property." These "three rights are so bound together as to be essentially one right. To give a man his life but deny him his liberty, is to take from him all that makes his life worth living. To give him his liberty but take from him the property which is the fruit and badge of his liberty, is to still leave him a slave."¹⁴ Accordingly, while he looked with disfavor upon extensive accumulations, thinking the rich would themselves be benefited by fewer, nevertheless he thought this consequence of our system much less pernicious than that which follows the arbitrary taking from A to give to B—"the first step upon that unhappy path which leads from a republic where every man may rise in proportion to his energy and ability, to a commune where energy and sloth, ability and ignorance, occupy in common the same dead level of individual despair."¹⁵ Sutherland believed, therefore, that a limit to personal acquisition is filled with danger as destructive of individual effort—that "The course of safety for society, as well as liberty for the individual, is to make and enforce laws which will keep free the gates of equal opportunity to all, compel an honest contest, and let the rewards for

11. The Courts and the Constitution, *supra*, page 372.

12. The Internal and External Powers of the National Government, by George Sutherland, United States Senator, Member of the Senate Committee on the Judiciary, Senate Document No. 417, 61st Cong., 2d Sess., March 8, 1910, at page 12.

13. Principle or Expedient? *supra*, page 19.

14. *Id.* at page 18.

15. *Id.* at page 19.

diligence fall where and how and in such measure as they may."¹⁶

Principle or Expediency

Sutherland decried expediency. Only by adhering to principle can we prevent our governmental character from disintegrating, our political establishment from losing its character as a government of laws. Violations of principle begin on the plea of necessity, are continued on the score of expediency, and finally as a mere matter of course. "The inflexible rule in all such cases should be *obsta principis*."¹⁷ History teaches that "every attempt to remedy an undesirable condition by setting aside some great fundamental principle has not only generally failed, but has generated consequences more seriously unfortunate than the original evil itself."¹⁸ Again he said: "Do the people of this land—in the providence of God, favored, as they sometimes boast, above all others in the plenitude of their liberties—desire to preserve those so carefully protected by the First Amendment: liberty of religious worship, freedom of speech and of the press, and the right as freemen peaceably to assemble and petition their government for a redress of grievances? If so, let them withstand all *beginnings* of encroachment. For the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time."¹⁹ And further: "If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned."²⁰ Sutherland saw that in view of the inevitability of change we must tread new paths, but he thought we should do so "with far surer steps under the illuminating guidance of great and permanent principles which have never failed, than we shall by the doubtful leading of expedient which seeks only to satisfy the command or desire of the moment."²¹ He subscribed to St. Paul's injunction, "Prove all things

and hold fast that which is good." He referred to the ancient Grecian running match in which "each participant carried a lighted torch. The prize was awarded not to that one who crossed the line first, but to him who crossed the line first with his torch still burning. It is important that we should advance, but the vital thing is not that we should simply get somewhere—anywhere—quickly, but that we should arrive at a definite goal with the torch of sanity and safety still ablaze."²²

Confidence in America

But Sutherland was not a perfectionist. Although he had faith in the Constitution as an enduring foundation of democratic principles, he was aware that the governmental superstructure of positive laws and agencies was but "a fallible human contrivance, under more or less wise and more or less foolish and more or less skillful and more or less stupid management, and consequently a mixture of success and failure."²³ Nevertheless, and despite the dangers ahead, he preached no gospel of despair. "My sure confidence," he said, "rests in the saving grace of the sober second thought of the American people, for, in the last analysis, we are a practical and a conservative people, sometimes, it is true, dreaming with our heads in the clouds, but always awakening to the realizing sense that we must walk with our feet upon the earth. Sometimes the haunting spell of the darkness is upon us, but in the end the night goes, 'the dawn comes, the cock crows, the ghost vanishes'; we open our eyes and all the uneasy and terrifying visions disappear in the light which fills the east with the glowing

promise of another morning."²⁴ Sutherland had for the citizens of his country the highest aspirations. "If I were able," he wrote, "to transcend the limitations of time and anticipate the final verdict of history upon my countrymen, I would have it written in words of everlasting light: *They respected the liberties of others because they were just and kept their own because they were strong and resolute.*"²⁵

Powers of the Government in Domestic and Foreign Affairs

Sutherland thought that the powers and objects of government must be commensurate, otherwise only a semi-government has been created. As to domestic matters certain specified powers are vested in the general government, and all others reserved to the states, or to the people; while as to foreign matters (with which the states are not competent to deal) all powers must be vested in the general government or reserved to the people. Hence to deny to the general government any power over external affairs is to preclude its exercise by any governmental agency; and it was within the contemplation of the framers of the Constitution that every necessary and proper power possessed by foreign governments over their external affairs should be exercised by the United States over its own.

Necessity of Preparedness

Sutherland foresaw the end of isolation. At the close of the first world war he said that "Our burden of responsibility will not be ended with the signing of the treaty. . . . And hereafter, as long as the Nation endures, we shall never be absent from the international council cham-

16. *Ibid.*

17. *Id.* at page 8.

18. *Ibid.*

19. *Associated Press v. National Labor Relations Board*, 301 U. S. 103 (1937). Mr. Justice Sutherland dissenting, pages 133-141, at page 141.

20. *Home Building & Loan Association v. Blaisdell*, 290 U. S. 398 (1934). Mr. Justice Sutherland dissenting, pages 448-483, at page 483.

21. Principle or Expedient?, *supra*, page 21.

22. Address to the Senate, *Constitutions*

of New Mexico and Arizona, July 11, 1911, on House joint resolution 14 (H. J. Res. 14—to admit the Territories of New Mexico and Arizona as States into the Union upon an equal footing with the original States), Cong. Rec. Vol. 47, Part 3, 62d Cong., 1st Sess., pages 2793-2803, at page 2795, 2d column.

23. Principle or Expedient?, *supra*, page 6.

24. Address to the Senate, *Constitutions of New Mexico and Arizona*, *supra*, page 2803, 1st column.

25. Constitutional Power and World Affairs, *supra*, page 174.

ber . . ." ²⁶ He thought it vain to lament this break with that condition of isolation which had been our boast and comfort; indeed he looked upon the nation's new responsibilities with pride. He said that to him who believes that "nations, like men, are made strong by bearing burdens and not by shirking them . . . the sense of these new responsibilities will come with a new sweep of exaltation that his country is again afforded opportunity for service in a world where all too seldom strength and unselfishness have gone together." ²⁷ Sutherland was no pacifist—he saw that the "causes of war among nations and peoples lie very deep in the nature of mankind—far deeper than armaments or land hunger or kings or capitalists or forms of government." ²⁸ We should teach the desirability of peace intensely and continuously, but also keep before ourselves always the clear danger of war. For "history demonstrates that forces are at work in the world . . . which . . . will again, sometimes, sweep us with a tempest of passion into the chaos of war." ²⁹ These were his words in 1918. In 1919 he foresaw the contingency of a combination of European and Asiatic powers against us and the vulnerability of our two coasts open to attack or invasion, saying: "For three years it was literally true that the battleships of Great Britain stood between the democratic world, ourselves included, and supreme disaster. That risk we must never incur again." ³⁰

Sutherland believed therefore in the necessity of military preparedness and warned against the false sense of security given by "the fatuous suggestion of a million citizens springing to arms overnight . . ." ³¹ This would be fruitful "only if the citizens had been taught to spring, and provision had first been made to have the arms within reasonable springing distance." ³² Sutherland saw that it is weakness, not strength which invites attack. Perhaps his best known words, uttered before the Senate in 1916 when he said that it was his view that "the new weapon [the submarine] must yield to the law and

not that the law must yield to the new weapon," ³³ and protested against "the spineless policy of retreat and scuttle," ³⁴ are: "Instead of warning our own people to *exercise* their rights at their peril, I would like to see issued a warning to other people to *interfere* with these rights at *their* peril. The danger of it all is that by this policy of always backing down instead of backing up we shall encourage an increased encroachment upon our rights until we shall finally be driven into a crisis from which nothing but war can extricate us." ³⁵ "The form of internationalism in which I believe," he said on another occasion, "is that of cordial cooperation among nations for the welfare and betterment of the people of all lands, but which will always look first to the welfare and betterment of our own." ³⁶

Determination of International Disputes

Sutherland favored some feasible method for peaceful determination of international disputes, but thought that the method must be practicable as well as righteous. He saw danger in a plan to compel obedience to an arbitral decree by military force, because unbiased decision as to the culpability of an "aggressor" is difficult to attain, and if we bind ourselves in a union with others to punish rebellious members with military force, we may well find ourselves required to attack a nation with which, although it has been declared an aggressor, our people would be in sympathy—for example France against Germany. Congress, in such an exigency, Sutherland thought, might refuse to act. He regarded it as wiser to provide for a court, not a mere arbitral board whose members are advocates rather than judges, to which national signatories should consent to submit all controversies

within the jurisdictional clause and by whose determination they should agree to abide. He believed that the force of public opinion throughout the world would be sufficient to insure compliance; but that if the world has not advanced to such a respect for law and order among nations as to insure compliance with the decisions of an International Court of Justice—as our states abide by the decisions of the Supreme Court—it has not reached the point where it may safely rely upon any other plan of peace enforcement.

Differentiation of Judicial and Legislative Branches

Sutherland looked with great respect upon the judicial function. He thought that "If the political structure erected by the Fathers rests upon any one pillar more securely than upon another, it is upon that which upholds the right of the individual to invoke the judgment of the civil courts of the land upon his conduct." ³⁷ He said, in the words of Chief Justice Marshall, "The judicial department comes home, in its effects, to every man's fireside; it passes on his property, his reputation, his life, his all." ³⁸ Its duty is to protect society against the individual who attempts to interfere with its peace and order, but at the same time to be no less fearless and independent to protect the individual against the unjust demands of society. Sutherland emphasized the importance of the judiciary under a written constitution in preserving for the people the structure and functions of the government, and the guaranteed rights of the individual. Since the Constitution is a mandate, the duty of the judge is plain, he thought, when in a given case he is called upon to determine the law, to hold invalid a statute—the act of an agency of the

26. *Id.* at page 167.

27. *Id.* at pages 167-8.

28. *Id.* at page 173.

29. *Ibid.*

30. *Id.* at page 178.

31. *Id.* at page 179.

32. *Ibid.*

33. Address to the Senate on Armed Merchant Ships, March 7, 1916, Cong. Rec. Vol. 53, Part 4, 64th Cong., 1st Sess., pages

3660-3664, at page 3661, 2d column.

34. *Id.* at page 3662, 2d column.

35. *Ibid.*

36. Constitutional Power and World Affairs, *supra*, pages 176-7.

37. *Id.* at page 88.

38. Address to the Senate, Constitutions of New Mexico and Arizona, *supra*, page 2802, 2d column.

people—if it beyond reasonable doubt conflicts with the supreme law emanating from the people themselves, who are the repository of ultimate sovereignty. And the doubts to be resolved are those of each individual judge—for his oath is not composite. And the check upon the judge is not, Sutherland thought, self-restraint, for that "belongs in the domain of will and not of judgment. The check upon the judge is that imposed by his oath of office, by the Constitution and by his own conscientious and informed convictions . . ."³⁹

The judicial function, in Sutherland's estimate, is to be sharply differentiated from the legislative. "The making of law is an exercise of the will of the state; the interpretation and application of the law is an exercise of the reason of the judge."⁴⁰ Social engineering is a legislative, not a judicial, function. The legislator concerns himself with the question: Is the proposed law just in its general application." "The official who administers the law has nothing to do with the abstract question of its justice; his function is to ascertain what it is and whether it has been violated."⁴¹ When it comes to making law, a constable and a judge are on the same footing. The judicial power does not include authority for amendment under the guise of interpretation. The clear words of statutes and the plain principles of the Constitution and of the common law are to be followed. Believing in the dependability of the faculty of reason as he did, Sutherland thought that judges could discover the law as an objective standard and apply it impersonally. The duty of the judge is to discover, declare, interpret and apply the law to facts as found. Sutherland recognized, of course, that statutes are not drawn with perfect clarity or in full prevision, but he thought that canons of construction, not fiat, should solve ambiguity of phrase and application. Although he recognized that certainty in the law, so that men may have order in their affairs, is almost, sometimes quite, as important as wisdom and justice, and therefore re-

spected the doctrine of *stare decisis*, he recognized that "precedent after all is not a fixed pathway, it is only the opinion of a former traveler as to where the pathway should be."⁴² While he thought that a principle of law which is sound and just is immutable, he realized that it might become inoperative, not because wrong, but because under altered conditions it no longer applied. He did not abjure, but on the contrary admired, the capacity for growth in the law through judicial decision; but he thought that this should be accomplished in the novel or borderline case, and by the analogical technique of the common law; and this was, in Sutherland's view, a process of reason which binds the judge to the result, not one of will to attain it. A judge has no constituents; he administers not the edicts of the people, but their laws and statutes. The law and the evidence constitute the only compelling voice to which he must listen. "The poised and balanced scales of justice and not the ballot box is the insignia of his office."⁴³

Style of Writing

As was to be expected from the nature of the man, Sutherland's style of writing was almost Lincolnian in directness and simplicity. The dictionary was his constant companion and most used book. He paid close attention to the connotation of words and selected the simplest and clearest means of expressing his thought. He was impatient of flowery writing, striving always for complete clarity. Yet his prose was not barren nor mathematical. It had grace, and in his political addresses especially, where he felt a duty to induce action, a highly persuasive quality the source of which was in reasonableness, fairness, and a keen understanding of the other man's mind and heart. When occasion called for their use he could wield the weapons of wit, humor, irony, sarcasm, even ridicule, effectively. He was able from the depth of his convictions to strike powerful blows. Always he was but the vehicle of his message. He told the truth for the truth's sake.

His judicial style was the clear product of his concept of law and of the judicial function. The facts of a case, its foundation in truth, and reasoned application of the appropriate rule of law, directed him to the result. To will the result and then seek to justify it was never his method. Accordingly his opinions are but simple statements of the facts and the law and of the result reached, and of the reasons why the facts and the law require it. He felt in his judicial writing a duty to demonstrate, not to persuade. Even his dissents, though they show depth of conviction, are more expository than partisan. His opinions have the clarity of engravings in outline and in detail. His pen was never darkened by uncertainty of mind, nor unsteadied by emotion, nor colored by desire for effect or attention. His stream of thought ran crystal clear between the banks of fact and law and upon the bed of reason.

Religious Views and Personal Traits

Mr. Justice Sutherland was by baptism an Episcopalian. But he was not strictly sectarian in outlook. He was certain that his good Mormon, Catholic, Protestant, and agnostic friends would meet with him in the Fatherhood of God. He believed in the power and goodness of God and in the efficacy of prayer. He thought that fatalism was a doctrine of indolence and cowardice, that man, having soul and reason and power of choice, had an obligation to exert himself toward good ends. He practiced Christian principles in his daily life. He was abundantly content with the life and times God had measured to him, and was confident of a new and greater adventure ahead; he was not only prepared for this, but anticipated it with trust.

39. *West Coast Hotel Co. v. Parrish*, 300 U. S. 379 (1936), Mr. Justice SUTHERLAND dissenting, pages 400-414, at page 402.

40. Private Rights and Government Control, Report of the Fortieth Annual Meeting of the American Bar Association, *supra*, pages 204-205.

41. *Id.* at page 205.

42. The Courts and the Constitution, *supra*, page 386.

43. *Id.* at page 380.

Sutherland, despite the limited time which he was able to devote to conventional education, was a learned man. He had an energetic, inquiring, and retentive mind, and from his boyhood read widely and with discrimination in classical literature, political science, and law. He read Kent's Commentaries once a year for many successive years—an example of his capacity for self-discipline. He especially instructed himself in constitutional law and history. He was characterized by President Taft as the greatest constitutional lawyer in the Senate. His mind was clear, logical, honest, and capable of fine distinctions and sound generalization.

Outside of his work he gave his time largely to reading, and to his family. He was devoted to the friends of his Western days with whom he had practiced his profession. He was frugal and conservative in personal life, giving himself assiduously to his professional tasks. Referring to their arduousness when on the Court, he quoted⁴⁴ Rossetti's lines:

Does the road wind up hill all the way?

Yes, to the very end.

Will the journey take the whole long day?

From morn till night, my friend.

A serious man, though not self-serious. He had dignity of bearing, the natural garment of dignity of spirit. Yet he was not austere; he was gracious, gentle spoken, calm in manner, genuinely kind.

His sense of humor was lively, his wit quick. He delighted in Western anecdotes, was an entertaining associate and speaker. In his message in 1941 to the graduating class of Brigham Young University he referred to the fact that he came to Utah some years after "the faithful and courageous band of exiles who came in 1847,"⁴⁵ and could therefore not himself claim to be a pioneer but perhaps could call himself a "pioneer-nearly." In speaking to the American Bar Association in 1912 on "The Courts and the Constitution," and

referring to the fact that change does not always mean progress, he said:⁴⁶

There stands in Paris at a point where several of the superb avenues of that city radiate like the points of a star, a stately and imposing structure called the Arch of Triumph. There are two methods by which the descent from the summit may be made, namely, by going slowly and laboriously down the stairway or utilizing the force of gravitation by jumping from the parapet. On a certain occasion a few years ago ten or a dozen men were standing at the top of that famous monument. All but one of them, being commonplace people, descended in the old fashioned, orthodox way, but that one, a gentleman of advanced views who had charmed the others by the brilliancy of his conversation and the boldness and originality of his speculations, came down by the alternative route, with the result that on the following afternoon he was laid away in the cemetery attached to the lunatic asylum from which he had escaped. The incident carries with it a lesson which I commend to the thoughtful consideration of the impatient reformers of these days, which is that to follow the constitutional stairway step by step may be a slow and tiresome process but it at least assures us of a safe arrival.

Sutherland had not only humor, but good humor; intolerant of evil, he tolerated men, accepting their opposition with good will and with assumption of their good faith. The barb of the mercenary and the rough assault of the zealot did not disturb his peace of mind and heart. Though he was saddened in his last years by what seemed to him a waning attachment to the traditions of the bench and of the Constitution under which, in his view, our freedom, our strength, and our prosperity had been attained, he did not lose heart. He loved his country, and had an abiding faith in its future.

Sutherland was a man of great integrity of character, and of strength of convictions. He founded his life upon the truth and the moral law. He scorned expediency, listened to no appeal but that of conscience and reason. He was, with all his learning and high position, a modest man who drew no attention to himself, sought no plaudits, was not prideful. He put his first trust in man's character rather than in his talents. He said to the students of his University in the address referred to: "The obligation to achieve your aim if it be worthy—that is to say, to be a good lawyer or a good doctor or a good banker, or whatever else you have set out to be—is a serious one, to be sure; but it sinks into nothingness compared with the obligation to be a good man . . ."⁴⁷ He practiced this precept. His greatness as a judge—history will mark him one of the ablest—is founded first upon his goodness as a man. In this same admonition to students he placed his second emphasis on work: "A merely brilliant intellect is not enough. Solid attainments and work—always work—are the indispensable requisites for victory."⁴⁸

Those who knew Mr. Justice Sutherland as man and friend, as lawyer, Senator, and judge, who have heard what he said, have read what he wrote, and have passed his life in review, find in these lines his way of life:⁴⁹

By thine own soul's law learn to live.

And if men thwart thee take no heed.

And if men hate thee have no care;

Sing thou thy song and do thy deed.

Hope thou thy hope and praythy prayer.

And claim no crown they will not give,

Nor bays they grudge thee for thy hair.⁵⁰

44. Address of Justice Sutherland, Proceedings of the Twentieth Annual Session of the State Bar Association of Utah, Salt Lake City, June 14, 1924, pages 55-67, at page 62.

45. A Message to the 1941 Graduating Class of Brigham Young University from Mr. Justice Sutherland, read by Judge George S. Ballif in the Sixty-fifth Commencement Exercises, June 4, 1941. Published by Brigham Young University, Provo, Utah.

46. The Courts and the Constitution, *supra*, page 376.

47. A Message to the 1941 Graduating Class of Brigham Young University, *supra*.

48. *Id.* at page 13.

49. To Thine Own Self Be True, by Pakenham Beatty, Stanza 1; Poems You Ought to Know, Elia W. Peattie, Fleming H. Revell Company, 1903, page 37.

50. The material for these remarks in honor of Mr. Justice Sutherland was collected not merely from the sources referred to in footnotes above but also from information supplied by Hon. William H. King, Hon. Frank K. Nebeker and Mr. John W. Cragun of Washington, D. C., Hon. James H. Moyle and Hon. W. W. Ray of Salt Lake City, Utah, Mr. Francis R. Kirkham of San Francisco, California, and Dean E. Blythe Stason, University of Michigan Law School. Credit and thanks are extended to them for many interesting items.

Charter of the International Military Tribunal

I

Constitution of the International Military Tribunal

ARTICLE 1. In pursuance of the agreement signed on Aug. 8, 1945, entered into by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics, there shall be established an International Military Tribunal (hereinafter called "The Tribunal") for the just and prompt trial and punishment of the major war criminals of the European Axis.

ARTICLE 2. The Tribunal shall consist of four members, each with an alternate. One member and one alternate shall be appointed by each of the signatories. The alternates shall, so far as they are able, be present at all sessions of the Tribunal. In case of illness of any member of the Tribunal or his incapacity for some other reason to fulfill his functions, his alternate shall take his place.

ARTICLE 3. Neither the Tribunal, its members nor their alternates can be challenged by the prosecution, or by the defendants or their counsel. Each signatory may replace its member of the Tribunal or his alternate for reasons of health or for other good reasons, except that no replacement may take place during a trial, other than by an alternate.

ARTICLE 4. (A) The presence of all four members of the Tribunal, or the alternate for any absent mem-

ber, shall be necessary to constitute the quorum.

(B) The members of the Tribunal shall before any trial begins, agree among themselves upon the selection from their number of a President, and the President shall hold office during that trial, or as may otherwise be agreed by a vote of not less than three members. The principle of rotation of Presidency for successive trials is agreed. If, however, a session of the Tribunal takes place on the territory of one of the four signatories, the representative of that signatory on the Tribunal shall preside.

(C) Save as aforesaid the Tribunal shall take decisions by a majority vote, and in case the votes are evenly divided the vote of the President shall be decisive. Provided always that convictions and sentences shall only be imposed by affirmative votes of at least three members of the Tribunal.

ARTICLE 5. In case of need and depending on the number of the matters to be tried, other Tribunals may be set up, and the establishment, functions and procedure of each Tribunal shall be identical, and shall be governed by this charter.

II

Jurisdiction and General Principles

ARTICLE 6. The Tribunal established by the agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the

interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes:

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(A) Crimes against peace. Namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

(B) War crimes. Namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of, or in, occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages or devastation not justified by military necessity.

(C) Crimes against humanity. Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of, or in connection with, any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the

formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

ARTICLE 7. The official position of defendants, whether as heads of state or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment.

ARTICLE 8. The fact that the defendant acted pursuant to order of his Government, or of a superior, shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

ARTICLE 9. At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.

After receipt of the indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organization will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organization. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard.

ARTICLE 10: In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.

ARTICLE 11: Any person convicted by the Tribunal may be charged before a national, military or occupation court, referred to in Article 10

of this Charter, with a crime other than of membership in a criminal group or organization and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organization.

ARTICLE 12: The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.

ARTICLE 13: The Tribunal shall draw up rules for its procedure. These rules shall not be inconsistent with the provisions of this Charter.

III

Committee for the Investigation and Prosecution of Major War Criminals

ARTICLE 14: Each signatory shall appoint a chief prosecutor for the investigation of the charges against and the prosecution of major war criminals.

The chief prosecutors shall act as a committee for the following purposes:

(A) To agree upon a plan of the individual work of each of the chief prosecutors and his staff.

(B) To settle the final designation of major war criminals to be tried by the Tribunal.

(C) To approve the indictment and the documents to be submitted therewith.

(D) To lodge the indictment and the accompanying documents with the Tribunal.

(E) To draw up and recommend to the Tribunal for its approval draft rules of procedure, contemplated by Article 13 of this Charter.

The Tribunal shall have power to accept, with or without amendments, or to reject, the rules so recommended.

The committee shall act in all the above matters by a majority vote

and shall appoint a chairman as may be convenient and in accordance with the principle of rotation; provided that if there is an equal division of vote concerning the designation of a defendant to be tried by the Tribunal, or the crimes with which he shall be charged, that proposal will be adopted which was made by the party which proposed that the particular defendant be tried, or the particular charges be preferred against him.

ARTICLE 15: The chief prosecutors shall individually, and acting in collaboration with one another, also undertake the following duties:

(A) Investigation, collection and production before or at the trial of all necessary evidence.

(B) The preparation of the indictment for approval by the committee in accordance with Paragraph C of Article 14 hereof.

(C) The preliminary examination of all necessary witnesses and of the defendants.

(D) To act as prosecutor at the trial.

(E) To appoint representatives to carry out such duties as may be assigned to them.

(F) To undertake such other matters as may appear necessary to them for the purposes of the preparation for and conduct of the trial.

It is understood that no witness or defendant detained by any signatory shall be taken out of the possession of that signatory without its assent.

IV

Fair Trial for Defendants

ARTICLE 16. In order to ensure fair trial for the defendants the following procedure shall be followed:

(A) The indictment shall include full particulars specifying in detail the charges against the defendants. A copy of the indictment and of all the documents lodged with the indictment, translated into a language which he understands, shall be furnished to the defendant at a reasonable time before the trial.

(B) During any preliminary examination or trial of a defendant he shall have the right to give any explanation relevant to the charges made against him.

(C) A preliminary examination of a defendant and his trial shall be conducted in, or translated into, a language which the defendant understands.

(D) A defendant shall have the right to conduct his own defense before the Tribunal or to have the assistance of counsel.

(E) A defendant shall have the right through himself or through his counsel to present evidence at the trial in support of his defense and to cross-examine any witness called by the prosecution.

V

Powers of the Tribunal and Conduct of the Trial

ARTICLE 17. The Tribunal shall have the power:

(A) To summon witnesses to the trial and to require their attendance and testimony and to put questions to them.

(B) To interrogate any defendant.

(C) To require the production of documents and other evidentiary material.

(D) To administer oaths to witnesses.

(E) To appoint officers for the carrying out of any task designated by the Tribunal, including the power to have evidence taken on commission.

ARTICLE 18. The Tribunal shall:

(A) Confine the trial strictly to an expeditious hearing of the issues raised by the charges.

(B) Take strict measures to prevent any action which will cause unreasonable delay and rule out irrelevant issues and statements of any kind whatsoever.

(C) Deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any defendant or his counsel from some or all further proceedings, but

without prejudice to the determination of the charges.

ARTICLE 19. The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure and shall admit any evidence which it deems to have probative value.

ARTICLE 20. The Tribunal may require to be informed of the nature of any evidence before it is offered so that it may rule upon the relevance thereof.

ARTICLE 21. The Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof. It shall also take judicial notice of official governmental documents and reports of the United Nations, including the acts and documents of the committees set up in the various Allied countries for the investigation of war crimes, and the records and findings of military or other tribunals of any of the United Nations.

ARTICLE 22. The permanent seat of the Tribunal shall be in Berlin. The first meetings of the members of the Tribunal and of the chief prosecutors shall be held in Berlin in a place to be designated by the Control Council for Germany. The first trial shall be held at Nuernberg and any subsequent trials shall be held at such places as the tribunal may decide.

ARTICLE 23. One or more of the chief prosecutors may take part in the prosecution at each trial. The function of any chief prosecutor may be discharged by him personally or by any person authorized by him.

The function of counsel for a defendant may be discharged at the defendant's request by any counsel professionally qualified to conduct cases before the courts of his own country, or by any other person who may be specially authorized thereto by the Tribunal.

ARTICLE 24. The proceedings at the trial shall take the following course:

(A) The indictment shall be read in court.

(B) The Tribunal shall ask each defendant whether he pleads "guilty" or "not guilty."

(C) The prosecution shall make an opening statement.

(D) The Tribunal shall ask the prosecution and the defense what evidence (if any) they wish to submit to the Tribunal, and the Tribunal shall rule upon the admissibility of any such evidence.

(E) The witnesses for the prosecution shall be examined and after that the witnesses for the defense. Thereafter such rebutting evidence as may be held by the Tribunal to be admissible shall be called by either the prosecution or the defense.

(F) The Tribunal may put any question to any witness and to any defendant at any time.

(G) The prosecution and the defense shall interrogate and may cross-examine any witnesses and any defendant who gives testimony.

(H) The defense shall address the court.

(I) The prosecution shall address the court.

(J) Each defendant may make a statement to the Tribunal.

(K) The Tribunal shall deliver judgment and pronounce sentence.

ARTICLE 25. All official documents shall be produced, and all court proceedings conducted, in English, French and Russian and in the language of the defendant. So much of the record and of the proceedings may also be translated into the language of any country in which the Tribunal is sitting as the Tribunal considers desirable in the interests of justice and public opinion.

VI

Judgment and Sentences

ARTICLE 26. The judgment of the Tribunal as to the guilt or the innocence of any defendant shall give the reasons on which it is based and shall be final and not subject to review.

ARTICLE 27. The Tribunal shall have the right to impose upon a defendant, on conviction, death or

such other punishment as shall be determined by it to be just.

ARTICLE 28. In addition to any punishment imposed by it the Tribunal shall have the right to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany.

ARTICLE 29. In case of guilt, sentences shall be carried out in accordance with the orders of the Con-

trol Council for Germany, which may at any time reduce or otherwise alter the sentences, but may not increase the severity thereof. If the Control Council for Germany, after any defendant has been convicted and sentenced, discovers fresh evidences which in its opinion, would found a fresh charge against him, the Council shall report accordingly to the committee established under Article 14

hereof for such action as they may consider proper, having regard to the interest of justice.

VII

Expenses

ARTICLE 30. The expenses of the Tribunal and of the trials shall be charged by the signatories against the funds allotted for maintenance of the Control Council for Germany.

Further Action on United Nations Charter

Mitchell B. Carroll, *Chairman*

SECTION OF INTERNATIONAL AND COMPARATIVE LAW

Now that the Senate, on July 28, 1945, has given its advice and consent to the ratification of the United Nations Charter, after a debate of only one week and by an overwhelming vote of 89 to 2, the members of the Association may consider what they can do to contribute to the success of the World Organization, in addition to the submission of its recommendations at San Francisco, by President David A. Simmons, as consultant, and his associates, Tappan Gregory, Chairman of the House of Delegates, and the writer as Chairman of the Section of International and Comparative Law. The United Nations will not come into existence until the Charter is also ratified by Russia, Britain, France, China and any other twenty-three of the fifty states which signed the document at San Francisco. Nicaragua, El Salvador and Costa Rica have taken the lead in ratifying it.

Implementing Measures

To implement the Charter in preventing or restraining future aggres-

sion, Congress presumably will adopt six additional measures:

1. Legislation creating the office of the United States Delegate to the Security Council and defining his powers to vote in favor of utilizing our forces against aggressors in the future;
2. Legislation approving the special agreement with the Security Council referred to in Article 43 of the Charter, which will define the size and type of the forces we are going to put at the disposal of the Security Council;
3. Legislation appropriating our share of the expense of the new organization;
4. A resolution to determine whether the United States is willing to accept the compulsory jurisdiction of the International Court of Justice, under article 36 of its statute;
5. Appropriate action on agreements placing any territories we may take over as the result of the war, such as the Jap-

anese mandated islands in the Pacific, under the trusteeship system;

6. Appropriate action to grant diplomatic privileges and immunities to all the officials of the new organization.

Effect of Charter as Master Agreement

It seems clear from the debate which took place the week of July 23 that the vote of the Senate on July 28 was the last vote that will be taken on the Charter or its implementation under the two-thirds rule for approving treaties. Hence, the implementation will be accomplished by legislation or resolutions requiring only a majority vote of each House, and perhaps to some extent by executive agreements.

The debate is also believed to have established the fact that the ratification of the Charter itself definitely obligates the United States to put at the disposal of the Security Council under Article 43 of the Charter, "on its call and in accord-

ance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security." The Administration's contention is that this article in the master agreement binds us, and that the special agreements are merely to define the size and type of the forces to be put at the disposal of the Security Council.

Treaty Embodying Act of Chapultepec

There will be one related measure, however, which presumably will be adopted as a treaty by a two-thirds vote of the Senate, namely, a treaty scheduled to be negotiated at Rio de Janeiro in October, incorporating the obligation in the Act of Chapultepec which will bind us as well as the Latin American countries to come to the defense of any signatory if it is threatened by another country within or without the Hemisphere. This regional understanding is reported to be a prerequisite for the adherence of most of our Southern neighbors to the world organization. It represents a very vital implementation of the Monroe Doctrine.

Questions for an Association Stand

As the Association is not scheduled to meet again until December, probably most, if not all, of the foregoing measures will have been adopted before it has an opportunity to act. In any event, as the Association has already approved in principle an organization founded on the Dumbarton Oaks Proposals, and as most of its specific recommendations of April 5 are reflected in the Charter, it goes without saying that it applauds the action of the Senate on July 28, and favors whatever legislation is necessary to implement the Charter through defining the powers of our Delegate on the Security Council and placing the necessary forces at its disposal.

There are, nevertheless, at least three general questions on which the Association might issue a pronouncement.

Is Congress to be Deprived of Power to Declare War?

In the first place, there apparently still remains the question as to (1) whether Congress is to authorize in advance the use of limited forces, or any amount up to the entire military and economic resources of the United States if needed to arrest aggression, and the corollary (2) whether the admitted power of the President to use on his own initiative relatively small forces in defense of American interests is to apply to big forces and supersede the Constitutional power of Congress to declare war.

This question was put in Recommendation No. 11 adopted by the Section of International and Comparative Law, on January 27, 1945, which may come up for debate at the next meeting of the House of Delegates, unless Congress in the meantime will have already reached a decision.

Should a Nation Act as Judge in its Own Case?

Practically all the members of the American Delegation to San Francisco have admitted that the Charter contains many imperfections, one of which is that, in predicated action by the Security Council on the unanimity of the five nations with permanent seats, China, France, Great Britain, Russia and the United States, have each been granted the right to veto repressive action against itself.

The experience of the League of Nations in the Sino-Japanese affair in 1931 and the Italo-Ethiopian affair in 1935 shows conclusively that it was too much to expect that an accord could always be found between the "Big Five" of World War I, Britain, France, Italy and Japan, who were permanent members of the Council of the League of Nations, and the United States, which met with the Council in the Sino-Japanese affair to lend its moral weight in finding a peaceful solution. The events also showed that remonstrances or peaceful means of settle-

ment are futile unless backed by force.

Even during the San Francisco Conference, the Damascus episode and the dispute over the admission of Poland as one of the United Nations showed that unanimity is not always possible among the present "Big Five." Hence, there is no reason to expect that, in the long run, the generally recognized rule, that a person should not act as judge in his own case, will be effective in preventing future wars if it is limited to decisions of the Security Council concerning the pacific settlement of disputes.

Obviously, the very existence of this right of veto, which is a discrimination in favor of the "Big Five" and contrary to the basic principle of sovereign equality of all members, is likely to result in the frustration of the project on which the hopes of future peace depend. Hence, world opinion against the exercise of the veto power should be strengthened and, to that end, the Association should approve the general recommendation adopted by the Section on January 27, 1945, that, in any matter before the Security Council, even if it involves other than pacific means of settlement, a party to a dispute should not participate in the decision of the Council.

Should the World Court Have Compulsory Jurisdiction?

The statute of the new International Court of Justice does not provide in the first instance that a member of the organization may be required to defend itself before the Court, but reproduces Article 36 of the statute of the Permanent Court of International Justice, known as the "optional clause." Under it more than forty States declared their acceptance of obligatory jurisdiction in the four classes of cases specified. The question is now before Congress as to whether the United States will accept the obligatory jurisdiction of the new Court. It is desirable that the Association should adopt a resolution that this be done.

James Francis Byrnes

For its cover for this issue, the JOURNAL turns aside from the delineation of structures and localities which have figured in the shaping of the international law of the future, to present the portrait of a devoted member of the American Bar Association who has served his country in many outstanding capacities during this time of war as throughout his career, who has influenced profoundly the public law of his generation and of years to come, and who as Secretary of State is now grappling boldly with the unprecedented problems which beset a world that is striving for peace, justice and law among the Nations. Such a cover-portrait for our September issue is especially appropriate in view of the fact that on August 13 President Truman pinned on Judge Byrnes' breast the Distinguished Service Medal, in recognition of his exceptional service during two years and a half as Director of War Mobilization. The citation which bestowed this high honor upon this member of the American Bar Association declared that "with vast understanding, exceptional skill as an arbiter, unswerving devotion to the national interests, and firm determination, Mr. Byrnes performed difficult services of high importance, making a major contribution to the war effort."

When the United States declared war against the Axis Powers, James F. Byrnes was happy in his work as an Associate Justice of the Supreme Court of the United States. His appointment to that tribunal by President Roosevelt on June 12, 1941, had come as the fortunate realization of years of ambition as a lawyer and public servant—the culmination of his career, the agreeable release from long struggles in the legislative forum. Before ascending the bench, he had been a member of the Na-

tional House of Representatives from 1911 to 1925, and Senator of the United States from 1931 to the time of his appointment to the Supreme Court in 1941.

Naturally Mr. Justice Byrnes was loath to leave a position so exalted and associations so congenial. Yet when his Commander-in-Chief, the President of the United States, told him that his services were sorely needed to help the Government to cope with the mounting and vexing problems of wage and price stabilization and kindred perplexities in the economic sphere, he unhesitatingly obeyed the call, like a good soldier in a time of war, and on October 3, 1942, he plunged himself bravely into what seemed the almost insuperable tasks of fending against inflation and preserving an economy suited to the maximum prosecution of the war.

At the time he resigned from the Court to take over the vast tasks as Director of the office of Economic Stabilization, the JOURNAL said, (28 A.B.A.J. 758): "It is well known to his intimates that only a full realization that his country's call to him was imperative and emergent beyond any denying, could have led him to leave the Court and the work he so highly esteemed. When it was suggested to him that he could have an indefinite leave of absence from the Court, while he struggled with the tasks of economic stabilization, he refused to consider such a course. He adhered to his staunch conviction that such an office as that to which he was summoned should be held only by an incumbent whose connection with any other branch of the Government had been completely severed, and particularly that membership in the Supreme Court should be held only by men who keep themselves at all times free to give full and undivided devotion to the work of the Court,

without absorption in other things. So his resignation was without reservation or expectations of return."

As Director of the Office of Economic Stabilization from October 1942 to May, 1943, he kept his feet and threw into his work all of his skill, patience, legislative experience, industry and open-mindedness. Soon he was recognized as "Assistant President" and, with President Roosevelt's failing health and complete absorption in waging war and maintaining the solidarity of the United Nations, he was recognized as the actual chieftain of the "home front," the planner and director of the economy of gigantic production for war and the preserving of tolerable living conditions for civilians.

Naturally, his course brought him into sharp clashes with special interests and powerful "pressure groups," and made for him many opponents if not enemies, who tried again and again to balk him, and finally barred him from nomination for the Vice Presidency at the time when it was recognized that the nominee would probably succeed to the Presidency before the four-year term had run. But "Jimmy" Byrnes was undaunted; he smiled and worked his way ahead, and to his everlasting credit he resolutely "held the line," for the most part, against the spirals of inflation and "runaway" wages and prices which would have dislocated permanently the American economy.

As the magnitude and complexity of the economic and production problems grew, more sweeping powers and responsibilities were put into his hands, along with more inclusive titles. Successively, he was Director of the Office of Economic Stabilization from October, 1942, to May, 1943; Director of the Office of War Mobilization from May, 1943, to October, 1944; and Director of the Office of

War Mobilization and Reconversion from October, 1944 to April, 1945, when he resigned and went back to his law office in Spartansburg, South Carolina, intent on taking up again the practice of law.

He had long cherished a purpose to gain for himself the rewards and the satisfactions of the independent practice of his profession; and it seemed to him that the coming of V-E Day and victory in Europe fairly entitled him to lay down the great burdens with which he had struggled, almost beyond enduring. During his many years in public office, he had not been able to practice law as he wanted to do, because he would not accept retainers where his prestige and influence in the government might be an inducing consideration. The full story of his resignation and retirement from the service of his country in 1945 has not been written, nor have all the gaps yet been filled in on the chronicle of political events which led him to withdraw his name from consideration for the Vice Presidency in 1944. Whatever of personal disappointment there may have been has never been expressed; he bided his time, and kept faith with those who had honored him with their friendship and their confidence.

When it was proposed to Senator Truman, during the 1944 National Convention of his party, that he should become a candidate for the nomination for Vice President, his reply is reported to have been: "I can't do that; I came here to nominate Jimmy Byrnes." When the political fates decreed otherwise and Senator Truman came to the rostrum to accept the nomination for the office from which he would soon ascend to the Presidency, it is said that he still had in his pocket the manuscript he had prepared for the speech he had expected and wanted to deliver in placing Mr. Byrnes in nomination.

When the death of Franklin D. Roosevelt made Harry S. Truman President, the resultant crisis for the country stirred "Jimmy" Byrnes to an instant realization that his great

experience and skill must be at the disposal of his close friend and co-worker, the incoming President. So today he is the Secretary of State, the most trusted adviser of President Truman and the galaxy of men who now have the burdens of the Government. Should the tragedy of mishap befall the present President, the Secretary of State would succeed him.

Judge Byrnes has long taken a deep interest in international affairs. His friends recall with thrill his intense, outspoken devotion to the cause of the Allies, when war broke out in Europe. His philosophy and objectives have been those of his very close friend and constant adviser, the sagacious Cordell Hull. He has realized from the first that America could not longer remain aloof from leadership and responsibility in the present-day world. He has been a staunch, far-sighted champion of the United Nations Charter and the World Court; and the recent Potsdam-Berlin Agreements bear indelibly the imprints of his forthright statesmanship, as do also the diplomatic exchanges which accomplished the ending of the war.

Since 1938 Judge Byrnes has been an active and interested member of the American Bar Association, and has been helpful to its causes on many occasions. During the leadership of his beloved cousin, Frank J. Hogan, in Association affairs, he was especially active, and his address at the San Francisco meeting in 1939 (25 A.B.A.J. 667-671) was a notable declaration for preserving the fundamentals of the American constitutional system despite the inescapable pressures for adaptation and growth. Many members of the Association recall with pleasure his presence and gay participation in the dinners which Frank J. Hogan gave each year, for many years, in honor of the President then in office in the Association. Judge Byrnes has honored many leaders in the Association with his friendship and often with his wise counsel.

The story of his career is a characteristic saga of success under the American ideals and way of life. His origins were humble; his opportuni-

ties were made in spite of very limited financial resources. Born in Charleston, South Carolina, May 2, 1879, he made his own way, as did his cousin, Frank Hogan. He began work as an office boy, studied law under great difficulties, was admitted to the bar in 1903, held humble positions at first in his State, and forged ahead only by his own hard work and his great genius for friendship.

Like so many lawyers who rise to high public place, Secretary Byrnes has demonstrated, throughout his whole career, that he is above all a member of a team, with an exceptional skill for marshalling and uniting support, "finding out the other fellow's point of view," reconciling differences and getting things done, usually without sacrifice of his essential convictions as to what may or may not be done by government. In a time of crisis and change, when conditions have called for extraordinary powers and expedients, he has retained his belief in the American system of constitutional government and in the observance of constitutional and statutory limitations on official action as to matters not within the scope of the war powers and needs. The citation which brought him the Distinguished Service Medal aptly referred to the fact that "when necessary, he did not hesitate to support unpopular measures essential to the prosecution of the war." Happily, most or many of these will soon be merely a memory of unpleasantness, sometimes hardship; and he has probably been as active a factor in getting rid of them promptly as he was in establishing them boldly. On many vital issues which seemed to him to be of principle, he did not hesitate to take his stand and stand his ground, against all sorts of pressures; and his course commended him to the good opinion of many Americans who esteemed him for the men who opposed his advancement. Without agreeing in all respects with his domestic policies and his official acts, American lawyers have just pride in the notable public service rendered by this member of our profession during World War II.

Lawyer Veterans Look to the Bar for Refresher Programs

Lawyers returning from the armed forces are looking to the organized bar for aid in reorienting themselves in professional work. The American Bar Association's Section of Legal Education and Admissions to the Bar, in cooperation with the Practising Law Institute, is conducting a national program of refresher training for lawyer war veterans. The purpose of the program is to provide the veteran with instruction in the lawyer's approach, working methods and techniques so that he will be qualified on resuming or beginning the practice of law to handle adequately affairs of clients. The program is being sponsored in cooperation with state and local bar associations and the law schools.

The refresher program will be carried on by means of lecture courses and publications prepared especially for this purpose. Courses will be conducted in the larger cities throughout the United States as well as in some smaller cities where a sufficient number of lawyers from the surrounding areas will gather to attend lectures.

The curriculum and the schedule of lectures will be arranged to meet local needs. The program can be concentrated into a period of one or two weeks with lectures scheduled on a full day basis or the lectures can be conducted in the evenings, over a period of three to six months. The courses will also be found of value and may be attended by all lawyers, veterans and non-veterans. Veterans enrolling for the lecture courses may do so under the educational benefits provisions of the

Servicemen's Readjustment Act.

An important aspect of the program will be the publication of monographs on the subjects of the lectures. These articles will be complete discussions of the subjects dealt with and are being written so that they can be understood without attendance at the lectures. They will be available to lawyers who do not attend the lectures and of course, will be distributed to all those enrolled in the regular lecture program. The printed materials are being prepared by over thirty-five specialists in the various fields of law and will total several thousand pages. They will be supplemented by addenda explaining the various changes in the law and important variations in practice in particular states. It is planned to begin issuing these monographs before the end of the year. A feature of the printed materials will be the inclusion of many typical forms annotated by marginal comments indicating the purposes of the various clauses. Some of the subjects which will be covered in the monographs are: Selecting Juries; Opening to the Court or Jury; Direct and Cross Examination; Summation; Negligence Cases; Real Estate Transactions; Organizing Corporations and Corporate Practice; Actions Involving Decedents' Estates; Brief Writing and the Argument of Appeals; Drawing Wills and Trusts; Collecting Claims; Matrimonial Matters; Administrative Agencies; Labor Law; Federal Practice; etc.

Officers and committees of local bar associations and deans of law schools interested in making refresher

training available in their communities, should communicate with Russell N. Sullivan, Acting Adviser, Section of Legal Education and Admissions to the Bar, Altgeld Hall, Urbana, Illinois, sending a copy of their letters to Harold P. Seligson, Director, Practising Law Institute, 160 Broadway, New York, 7, New York.

The first refresher course to be conducted as part of the national program was given last winter in New York City under the joint sponsorship of the American Bar Association's Section of Legal Education, the New York State Bar Association, the War Committee of the Bar of the City of New York, and the Practising Law Institute. The course consisted of eighty-four hours of lectures, clinics and demonstrations given during a two-weeks' period.

Some state and local bar associations are planning their own programs. The Chicago Bar Association announced refresher courses for veterans beginning on June 18. Non-veteran lawyers are also invited to attend these courses. The classes for the summer term meet Mondays and Wednesdays from 4:30 to 6:35 P. M. The subjects being offered are: Probate Law and Practice, Civil Practice and Procedure, and Administrative Law. John W. Kearns is the chairman of the committee which planned and which is conducting this program.

William C. Mathes, chairman of the Committee on Continuing Education of the State Bar of California, recently announced a four-point program for that state . . . (1) A series of lecture courses giving emphasis

to recent changes in law will be given in the fall and spring in San Francisco, Sacramento, Los Angeles and San Diego. Syllabi are now in preparation, and it is expected that they will be ready for the opening courses this fall. (2) The committee will make the syllabi available to lawyers for individual or group study. (3) Short, intensive courses of approximately ten days' duration will be offered in some of the smaller communities in the state. (4) To meet the need for information in certain special fields, the committee has begun publication of a series of brochures on subjects in which the bar has expressed keen interest. Four of these have already appeared. They are: (a) Joint Tenancy, by Albert M. Cross, of the Los Angeles Bar; (b) Termination of War Contracts, by Herbert F. Sturdy, of the Los Angeles Bar; (c) Criminal Appeals, by Justice Thomas P. White, of the District Court of Appeal; (d) Annulment of Marriage, by Roy V. Rhodes, Judge of the Superior Court, Los Angeles.

The Massachusetts Bar Association has organized the Massachusetts

Post War Lawyers' Institute, which will have the responsibility for preparing refresher courses for that organization.

The Board of Governors of the Illinois State Bar Association has announced a series of four institutes to be conducted at various cities in the state during the coming year.

One thing is to be noted which all of these programs have in common. In all of them there is emphasis on the fact that these courses are open to veterans and non-veterans alike, and those responsible for them feel that they will be of real value to lawyers who have not been in the service.

Weston Vernon, Jr., chairman of the Committee on Refresher Programs, in a recent report to the Council of the Section stated:

"It is the committee's view that only through a national program such as the Section and the Practising Law Institute have organized, can completely satisfactory training and instruction be offered. Individual groups, even in populous areas, cannot be expected to prepare

the necessary printed materials, nor can they schedule courses frequently enough so that lawyer veterans will be able to commence their training within a short time of being discharged. It is hoped that some way will be found of avoiding a duplication of effort and utilizing in the national program the work done by local associations.

"Your committee has given consideration to the problems of communities which have a small number of lawyer war veterans and which are geographically removed from key centers where refresher courses are contemplated. The bar associations in these communities should be urged and encouraged to provide retraining for discharged servicemen by utilizing home talent for instruction. In many instances, Council and Section committee members can make a substantial contribution toward the national project by assisting in and guiding the organization of local informal refresher groups. Your committee and the Practising Law Institute will make available to these smaller groups their experience and program suggestions."

Announcement

Announcement of the nominations by the State Delegates for officers of the Association and members of the Board of Governors has previously been made to the members of the House of Delegates and has also appeared in the July issue of the Journal. In such announcement, it was stated that the nominee for the office of Secretary of the Association declined to accept the nomination, and attention was directed to the provisions of Article VIII, Section 2, of the Constitution, pertaining to nominations by petition.

Announcement is now made that, subsequent to July 1 and prior to August 2, a nominating petition was received by the Secretary, nominating Joseph D. Stecher, of Toledo, Ohio, for the office of Secretary of the Association. Such nominating petition is in sixty parts and contains the signatures of 544 members of the Association from the following states: Alabama, Arizona, Arkansas, Connecticut, Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

With such nominating petition, there was also filed the consent of the nominee.

Harry S. Knight,
Secretary

The General Lawyer's Stake in Our Patent Law

by Frederic B. Schramm

OF THE OHIO BAR

What is the primary concern of the average general lawyer?

Broadly stated, it is the preservation of his clients' rights. Some of his cases are of the spectacular sort, involving the so-called "human" rights, preservation or vindication of the right to life, liberty and freedom from injury to the person—criminal trials and negligence cases. However the bulk of the work in most law offices is less spectacular involving the more prosaic, but tremendously important preservation of property rights—matters pertaining to leases, mortgages, land, contracts, employment, labor relations, taxes, etc. After all, these property rights are human rights, too. Life alone, bare existence, would hold little satisfaction without the right to work and earn and protect and preserve the fruits of toil and labor. If we are to continue enjoying security in America, such property rights must be on a firm basis.

Lawyer's Major Task to Protect Property Rights

Recognition of new concepts in law will be necessary, to be sure, as conditions of life change. But the basic problem for all lawyers, whether liberal in outlook or conservative, will continue to be the preservation of the so-called property rights of clients, conveyances, sales, contracts, contracts with regard to employment, with regard to other matters.

Every general lawyer, therefore, regardless of political inclinations or social outlook upon life will con-

tinue to be interested in any matter which involves property rights, especially the right to enjoy the fruits of one's efforts. Anything which tends to undermine property rights, including the right to enjoy the fruits of one's labor, is the concern of the general lawyer.

The general lawyer cannot stand by with complacency while any form of these rights is being undermined; patents, trademarks, and copyrights are forms of property rights, and therefore general lawyers should be interested in them and any trend toward strengthening them or weakening them.

Patents Are Contractual Property

A patent has been defined as a privilege rather than a property right. This viewpoint, however, is erroneous. An inventor has an inherent right in what he invents. He can withhold it, or disclose it, but without a Patent Statute he would be powerless to prevent others from using it after he had disclosed it. To induce the inventor to disclose the invention, thus making it available to the public, and promoting the progress of science and useful arts, the Patent Statutes offer him the right to exclude others for a limited time (17 years) in exchange for giving a description of his invention "and of the manner and process of making, constructing, compounding and using it in such full, clear, concise and exact terms as to enable a person skilled in the art or science to

which it appertains, or with which it is most nearly connected to make, construct, compound and use the same . . ."

Thus a contract between the inventor and the public arises, whereby the inventor receives a property right from the public. Except for the fact that it is intangible and exists for but a limited period, patent property has the same attribute as other property, namely the right to exclude others. The characteristic feature of ownership of a farm or an automobile is the right to exclude others from using it. A mere right to use one's own property would be meaningless. It is the right to exclude others from using it that gives it substance.

The right of an inventor to his invention is no monopoly. It is no monopoly in any other sense than a man's own horse is a monopoly.—Daniel Webster.

Inventions Involve Labor and Capital

As in the case of other property, the rights of ownership of a patent are subject to the requirements that the property be so used as not to infringe the rights of others, that it be used in accordance with law. The owner of a patent is as subject to the anti-trust laws, for example, as the owner of a tract of land or a factory on it; although in each case, the ownership involves the right to exclude.

(Continued on page 492)

1. Section 4888 RS (U. S. CODE, TITLE 35, SECTION 33)

AMERICAN BAR ASSOCIATION

Journal

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The Charter and the Problems Ahead

When the Senate of the United States ratified the Charter of the United Nations, the first great step was taken to end the twenty-five year lag in the adherence and participation of America in international organization for peace, justice and law. The virtually unanimous vote, denoting the absence of partisan or geographical division, was the hopeful sign of a new epoch in our history and a new era in international relationships. The United States was the first of the principal Powers to ratify; and it moved to the front in this act of leadership months before anyone could have foreseen or even dared to hope that it would, when the Conference was convened in San Francisco at the end of April.

Even more reassuring than the vote was the high quality of the debate in the Senate and the vision with which the many problems were approached. American lawyers should not miss or forget the significance of this return to American traditions of great debate. The explanation and advocacy of the Charter by Chairman Connally of Texas and Senator Vandenberg of Michigan, parliamentary veterans who had achieved much in the Conference, were strong and skillful at every stage. The electrifying speeches of Senator George of Georgia and Senator Fulbright of Arkansas were outstanding in a discussion maintained at the highest levels of patriotic statesmanship—the leadership of American lawyers at their best in the legislative forum. The cooperation between the Senate leadership, The President, and the State Department, was augury of like

open-mindedness and teamwork in the many tasks of implementing and making effective the formal ratification of the Charter.

The more fully the Charter was studied and debated, the more clearly its merits stood out. The final document was revealed as a vast improvement, a virtual transformation, of the bare outlines drafted at Dumbarton Oaks. The inescapable conclusion emerged that the democratic processes of the Conference, the moral leadership of the smaller Nations, and the essential unity of the principal Powers, had truly given vitality, idealism, and vigor of concept, to a plan which many had first looked on with doubts and misgivings.

Perhaps fortunately the ratification of the Charter is followed by a legislative recess, as well as by the reporting of the results of the Potsdam conferences, so that the problems and tasks ahead can be looked at in entirety, before the Congress takes up the all-important things to be done if the ratification is to be more than a formality. It would be folly if the sponsors and friends of international organization were now to relax their efforts, in acceptance of any easy satisfaction from the fact that the United States is at last a member of an organization of the Nations and a formal party to the Statute of the World Court. The unfinished tasks are the more difficult; they may prove divisive.

Immediate problems are such as the selection, accountability and powers of the American representative in the Security Council, the scope of the Declaration which the United States will adopt and file to make effective its submission to the jurisdiction of the International Court of Justice, and the manner and extent to which the United States will commit itself in advance to make its armed forces available in pursuance of the mandate of the Security Council for the suppression of incipient aggression and acts of war. The Charter does not determine or control any of these questions for us; they are properly left as domestic issues, to be determined by the people of the United States according to our constitutional processes.

None of these problems is insoluble or need be long delayed, if the spirit which actuated the Senate debate can be perpetuated. The greater and more challenging questions are of the spirit and purpose of the Nations: Will the future relationships of the Nations, large and small, under the Charter, be based on international law, the security and rights of the smaller nations and their peoples, the dignity of human beings and their freedom to live their own lives and maintain their own institutions in their own way, or will the future relationships of the Nations be based on the exceptional position accorded the five principal Powers and a view on the part of a majority of them that they can "deal the cards" as they see fit, for the other forty-five or more, and can impose their will, their institu-

tions, and their ideologies, through the vast machinery of the United Nations?

American lawyers have already made clear and emphatic their earnest judgment that the *basic* answer to these questions, the very future of the Charter and of the rights of Nations and men, depend upon the earliest possible establishment and functioning of the International Court of Justice, the submission of all legal disputes broadly to its jurisdiction, the accountability and conformance of all Nations to its law-governed processes and judgments, and the development of the broadest scope, authority and efficacy for the rule of law among Nations. By no means all of the United Nations are yet at the stage of civilized government where their leaders and their peoples give full adherence to such a supremacy of justice, liberty and law. America cannot afford to lose time in taking the lead for these things. No one nation, small or large, can be wholly secure in its own territory, institutions, and way of life, until the *climate* of law and justice and of conformance to them as a matter of course is made the universal habit of mind of Nations and their peoples.

The Charter is designed to bring into being a lasting post-war or post-transition organization for the accomplishment of these objectives—an organization which can be improved from time to time in the light of experience. The Potsdam Conference erected a *transitional* organization of the "Big Five" alone—a Council of Foreign Ministers with staffs and mutually bestowed powers to cope with the tremendous tasks of Europe in transition from war to peace. For Germany and perhaps other adherents of the Axis, a great experiment is ventured, in taking away national entity and re-building responsible popular government from the localities up. Past mistakes in reconstituting and continuing the defeated national entities are being avoided, to the end that such countries may not re-build and re-arm themselves for a recurrence of aggression.

Such a transitional organization as the Council of Foreign Ministers, for working out and enforcing the terms of the peace, is no doubt necessary; and so long as it adheres to and is consistent with the enlightened principles of the Charter, it will be supported by the enlightened opinion of mankind. We can say hopefully, in Shakespeare's language from "Henry IV",

"If we can make our peace
Upon terms so large and so absolute
As our conditions shall consist upon,
Our peace shall stand as
firm as rocky mountains."

"Our conditions" of security and peace have become urgent indeed. The atomic bomb has left civilization no choice; international organization *must* be made to work, at all hazards. The recurrence of war would mean

the destruction of civilization. The importance of what was wrought in San Francisco is now multiplied many fold. In all possible earnestness the lawyers and peoples of the fifty United Nations will work and pray for the brighter day when the law-governed processes of the Charter, the Court, and other organs of the United Nations, will be in full operation and authority, as foundations for a lasting peace based on justice, fair play, law, and the rights and opportunities of men.

The Morse Resolution

"The hour is historic, the obligation sacred, the challenge great." In this spirit, Senator Wayne L. Morse of Oregon took a most useful initiative in the Senate on July 28. The resolution which he introduced (S. Res. 160) would recommend that the President proceed to make a declaration under Article 36 of the Statute of the International Court of Justice, accepting the compulsory jurisdiction of the Court over legal disputes. The resolution is in line with our professed aims. It is indeed a way "to keep faith with the spirit and intent of the San Francisco Charter." It unfurls for us a banner!

Judge Hudson gives the background and the setting of the proposal in this number of the JOURNAL. A few of his points may be underscored.

Twenty years ago, when it was proposed that the United States support the Permanent Court of International Justice by becoming a party to its Statute, no one in official position was adventurous enough to suggest that we accept its compulsory jurisdiction. All then contemplated was that we should give our moral support to the Court, and undertake to meet a part of its expenses. Even that failed to muster a two-thirds vote in the Senate in 1935.

Today we have moved on. We are no longer imprisoned by fears about a general international organization. The United States will be a Charter member of the United Nations. A global war now leads us to put peace first in our foreign policy. Yet we want it to be a peace with justice. We shall have an adequate Court. We wish to see it used. We wish to make it a bulwark of peace.

The Senate debate was on a high level. Yet so many questions were involved in the Charter that some of them, including those relating to the Court, were little explored. The mists which excited such fulminations in 1935 had melted away, and the Statute of the Court was consented to with hardly more than passing references. Only Senator Morse spoke on it at any length.

There were doubtless good reasons for the President's not suggesting to the Senate at this time that the United States accept the Court's jurisdiction as obligatory. Yet the final vote was so overwhelming that one

wonders whether the further step could not easily have been taken. So many American lawyers have spoken up on this point that the Senate might have been confident that such action would be greeted enthusiastically in the country.

It is clearly, as Judge Hudson says, "the next step," and he aptly characterizes the pending resolution as "spear-heading" it. The Charter and Statute alone do not suffice. We must implement them in such a way as to make the institutions of the new United Nations serve the practical needs of the future peace.

Faced with our present responsibilities, it is not enough for us to utter platitudes. We have passed beyond the stage of generalities. We cannot be content to point with pride. Let us declare a holiday on inaction. Let us get on with the organization of the world. Peace with justice according to international law is our goal. The Morse resolution is in that direction.

A New Charter for Justice and Peace

In this day of great documents which will profoundly affect the history of mankind for ages to come, one of the most significant is the Charter of the International Military Tribunal, which moves into advanced ground and establishes precedents of vast import. Like the Charter of the United Nations and the Statute of the International Court of Justice, with which it will justly rank, the new agreement is the product of the cooperative statesmanship of the lawyers and high jurists of the four great Powers directly concerned, and America contributed its full share of leadership and open-mindedness in arriving at the accord.

The agreement, as Mr. Justice Robert H. Jackson of our Supreme Court puts it, is "not only upon the principle of liability for war crimes and crimes of persecution, but also upon the principle of individual responsibility for the crime of attacking the international peace." The new tribunal, which will be a part of the transitional organization for peace and justice, is vested by the agreement with the power and duty to try and to punish "persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations," committed certain acts which are defined as "crimes".

The principle of the responsibility and legal accountability of individuals, even though high in government or in armed forces or political organizations, for offenses against collective security, is thus authoritatively recognized; and comprehensive means are provided for enforcing the outlawry of war, which hitherto has been chiefly a pious declaration put into treaties.

The significant categories of the new "crimes" are, in summary: (1) Crimes against the peace; the planning or waging of war of aggression; (2) Crimes in violation of the laws or customs of war, such as the compelling of "slave" labor, the murdering or mistreatment of civilians, prisoners of war, or hostages; and (3) Crimes against humanity itself, such as murder, extermination, enslavement, or political, racial or religious persecution. Neither official nor subordinate position is to exculpate any defendant, although proof that he was acting in obedience to orders from his government or a superior may be considered in mitigation of his punishment. Obviously, much of this enumeration is intended for retroactive application to gross offenders during the war in Europe; but the salutary effects of such a declaration may be a land-mark, even though it is hoped that such offenses will never recur in the world as organized for peace and justice.

Equally precedent-shattering are the procedural provisions for the new Tribunal. Account has evidently been taken of the strictures which Professor A. N. Trainin of the Soviet Union and others have levelled against the Anglo-Saxon concepts of the trial and punishment of war criminals. All this was forecasted in Charles Prince's brilliant review of the Trainin book (A.B.A.J., July 1945; pages 366-68). Mr. Justice Jackson's statement indicates that the difficulties in the way of agreement were on the procedural side. The Russians and the French, he reveals, were of the opinion that the Anglo-Saxon system has been "loaded in favor of delay" as well as "unduly tender of defendants" and too little concerned with the "social" consequences of a finding that the accused is guilty or innocent. The British and American systems have long stressed that the welfare of society is in greater danger from the conviction of the innocent than from the occasional acquittal of the guilty.

The new Charter draws heavily from the Continental procedures. Mr. Justice Jackson soundly insisted that the traditional concepts of a fair hearing for the accused and a verdict based on the evidence should be preserved at all hazards, lest the conscience of mankind be shocked by drastic penalties following arbitrary and summary trials. With the elements of fair trial vouchsafed, the importance of promptness in the hearing and determination of these cases was acceded to as a controlling consideration.

Although the International Military Tribunal is a part of the transitional organization for winning and establishing the peace, it seems likely that in some manner the vitalizing of international law and procedures against crimes such as this Charter has defined will be incorporated into the permanent international judicial system, under the Court of Justice. The agreement on this Charter, the putting of it into effect, and the trials

which will soon take place under it, are symbols of the new spirit of organized cooperation for law, peace and justice, which best may rule the world.

"The Dawn of Peace"

As this issue goes to press, details are being worked out for the ending of the war against Japan, through the full and unconditional surrender of the last of our enemies.

Time and mood do not permit adequate expression now of the profound sense of relief, the heartfelt gratitude, the overwhelming realization that the long wearying years of anxiety, of concentration on the tasks of war, of burdens and losses and personal tragedies, are at an end, in a world which has been ravaged and bereft by war as never before but still has possessed the faith and nascent vitality to organize itself for peace while the war still raged.

The stupendous facts as to the ending of the war are the nature and portent of the events to which its swift termination is attributable. The first was the devastation wrought by the atomic bomb—produced by the genius of the men of science and the skill of production managers and workers in the United States, Canada, and Great Britain. Continuance of the war was unthinkable for any aggressor Nation threatened with such wholesale annihilation. The second was the entry of the Soviet Union into the war against Japan and the grounds on which it was based.

To carry out the pledges and the principles embodied in the Charter of the United Nations, the Soviet Union took the first great "police action" of our new world-order. "The peoples of the USSR", declared *Izvestia*, "as well as the freedom-loving peoples of the world, can no longer tolerate a situation in which Japanese imperialists stubbornly condemn the countries of Eastern Asia to the horrors and devastation of war. The interests of all humanity require that the last center of war be extinguished as soon as possible."

So, "true to its duty as an ally," Soviet Russia sent her legions marching across Manchuria toward the heart of Japan—in the first great military movement to restore and enforce peace, by armed might if need be.

Vast powers to prevent the recurrence of wars are now in the hands of the five principal Powers of the United Nations, especially the "Big Three"; but the good will and support of the other United Nations, the smaller powers which have shown themselves to be custodians of international conscience and devotion to law, are as essential as armed might. Mankind is thus face to face with the issues of its own destiny. The horrendous potentialities which science has made available to mankind must be trusted in the hands of those who will use them for peace and justice, else civilization on this planet may be destroyed. Such vast agencies of se-

curity or chaos must be kept in the control of those who sincerely seek to maintain the rights of men and nations to live happily and shape their own institutions, to steer their own course but not to rule or dominate or proselyte others. The answer will be either the mainstay of peace or the means of more horrible surprise aggressions.

For the lawyers and peoples of the United States, the ending of the war brings no mood of exultation and exuberance. The immediate tasks of restoring our country, its peoples, its enterprises, its institutions, and its way of life, to a peacetime basis, are too urgent and compelling, for relaxation or mere celebration. It hardly seems possible, as we write, that of the many harassing things which wartime has brought many of the immediately annoying have already been discarded and all or most of those which are deeply disturbing can be ended in an orderly fashion if our people wish and will it. The signals for America are "full speed ahead".

George Sutherland

1862-1942

Attention is invited to the biographical study of the life and judicial career of George Sutherland, President of the American Bar Association during World War I, written by Associate Justice Harold M. Stephens of the United States Circuit Court of Appeals for the District of Columbia, and read at the memorial services held in the United States Supreme Court Building, December 18, 1944.

A brief account of the action of the Bar of the Supreme Court and of the session of the Court has heretofore been published. The JOURNAL has at last found it possible to publish in full in this issue Mr. Justice Stephens' notable memorial address.

Typical of Mr. Justice Sutherland's logical bent of mind and his adherence to fundamental Constitutional doctrine, was his opinion in *Patton v. U. S.*, 281 U. S., 276, 289, 290, in which he removed a wide-spread doubt on the part of lawyers and judges whether the right of trial by jury could be waived in a criminal case. He there reviewed the essential elements of trial by jury as at common law, and quoted with approval from Mr. Justice Gray's opinion in *Capital Traction Co. v. Hof*, 174 U. S., 1, 13-16, holding that these common law essentials are "imbedded in the Constitution" and "beyond the authority of the legislative department to destroy or abridge", and Mr. Justice Sutherland added "Any such attempt is vain and ineffectual, whatever form it may take." He thus arrayed himself in defense of the right of trial by jury "as at common law" and his opinion in these and other cases entitled him to high rank in the decisions which have preserved, in all the federal courts the function of the judge in declaring the law to the jury without invading the jury's province of deciding questions of fact.

Review of Recent Supreme Court Decisions

by Edgar Bronson Tolman*

Civil Rights—Deportation of Alien Communists

Bridges v. Wixon, 89 L. ed. Adv. Ops. 1489; 65 Sup. Ct. Rep. 1443; U. S. Law Week 4554. (No. 788, argued April 2 and 3, decided June 18, 1945).

Harry Bridges is an alien who entered this country from Australia in 1920. Deportation proceedings were instituted against him on the charge that he was a Communist or affiliated with the Communist Party of the United States and that the party advised and taught the overthrow by force of the Government of the United States and caused printed matter to be circulated which advocated that course. Under the statute then in force, conviction required proof that the defendant was at the time of indictment a member or affiliate of the Communist Party. Hon. James M. Landis was appointed as a special examiner and reported that the evidence established that Bridges was neither a member nor affiliate of the Communist Party. That report was sustained by the Secretary of Labor.

Congress thereafter amended the statute so as to provide for the deportation of any alien who was "at the time of entering the United States, or has been at any time thereafter" a member of or affiliated with an organization of the character attributed to the Communist Party. A second deportation proceeding was initiated against Bridges under the amended statute on the ground that when admitted to the United States he had been a member of or affiliated

with that organization. Another hearing was had. Hon. Charles B. Sears, the inspector designated to conduct the hearing and make a report, found that the Communist Party of the United States was an organization of the character described in the statute, that after entering this country Bridges became affiliated with the Marine Workers Industrial Union, and that that organization was affiliated with the Communist Party. He recommended deportation. The case was heard by the Board of Immigration Appeals, who found that Bridges had not been a member of or affiliated with either organization at any time after he entered the United States. The Attorney General reviewed the decision of the Board and rendered an opinion in which he made findings in accordance with those proposed by the inspector and ordered Bridges to be deported. A warrant of deportation was issued. Bridges surrendered himself to the custody of the immigration service and applied for a writ of habeas corpus from the District Court for the Northern District of California. That court denied the petition and remanded Bridges to the custody of the immigration officials. The Circuit Court of Appeals affirmed by a divided vote and the case was taken to the Supreme Court of the United States by certiorari. The Supreme Court reversed the judgment.

Mr. Justice DOUGLAS delivered the opinion of the Court. The opinion traces the history of Bridges' activities after his arrival in the United States from Australia, and it is stated that he soon became an active participant in union ac-

tivities, working particularly for the benefit of longshoremen. He was advanced from post to post until he became Pacific Coast District President of International Longshoremen and Warehousemen's Union. The opinion deals first with the charge that Bridges had been both "affiliated" with and a member of the Communist Party. The statutory definition of "affiliation" is considered and Mr. Justice DOUGLAS says on that branch of the case, "our review of the record convinces us that the finding of 'affiliation' was based on too loose a meaning of the term."

The charge of membership in the Communist Party is next taken up. The evidence is considered and the rules for the examination of persons under investigation are cited and analyzed and it is pointed out that the admission of evidence at the hearing consisted of statements by inspectors as to conversations with Bridges not admissible under the regulations above referred to. The opinion points out that "The Board of Immigration Appeals and the Attorney General both conceded that the statements were admitted in violation of Rules 150.1(c) and 150.6(i)." The Board ruled that "it was error to consider the statements as affirmative, probative evidence." The Attorney General, however, held that the accused waived objection to the admission of that testimony by not objecting thereto at the preliminary hearing and formally moving for its exclusion.

Mr. Justice DOUGLAS rejects that contention. He points out that objection was made in due time to the

*Assisted by JAMES L. HOMIRE.

admissibility of the evidence, but it was said that in any event the fundamental difficulty is that final authority in deportation cases is the judgment of the Attorney General and that the Attorney General could not overlook the challenge to the admissibility of the evidence at the preliminary hearing. Of the statements of O'Neil it is said, "Highly incriminating statements are used against him [Bridges]—statements which were unsworn and which under the governing regulations are inadmissible." Speaking of the character of the proceedings, Mr. Justice DOUGLAS says, "That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness. On the record before us it is clear that the use of O'Neil's *ex parte* statements was highly prejudicial. . . . Since it was error to admit O'Neil's unsworn statements against Bridges, since they were so crucial to the findings of membership, and since that issue was so close, we are unable to say that the order of deportation may be sustained without them.

Mr. Justice MURPHY delivered a concurring opinion. In the opening paragraph of his opinion Mr. Justice MURPHY says: "The record in this case will stand forever as a monument of man's intolerance of man." His concurring opinion follows the sequence of the prevailing opinion and presents no appreciable departure therefrom. The difference is chiefly in emphasis. His concurrence concludes as follows: "Only by zealously guarding the rights of the most humble, the most unorthodox and the most despised among us can freedom flourish and endure in our land."

The CHIEF JUSTICE delivered a dissenting opinion in which Mr. Justice ROBERTS and Mr. Justice FRANKFURTER joined.

In the opening sentence of that dissent it is declared that the deportation

order should be sustained and the judgment below affirmed.

It is also said that no novel question was presented by this case, and that "Under our Constitution and laws, Congress has its functions, the Attorney General his, and the courts theirs in regard to the deportation of aliens". The CHIEF JUSTICE declares that the function of the Court is "a very limited one." He invokes the settled doctrine that "in reviewing the fact findings of administrative officers or agencies, courts are without authority to set aside their findings if they are supported by evidence," and it is said that the Court has not departed from that rule in reviewing deportation orders by habeas corpus and that "there is no occasion for its doing so now."

The Act is examined and quoted at length and it is said that Congress has made no provision for direct or collateral review of the action of the administrative officer, the Attorney General, but on the contrary Congress has made the decision of the Attorney General final "as it may constitutionally do." It is further declared that "Only in the exercise of their authority to issue writs of habeas corpus, may courts inquire whether the Attorney General has exceeded his statutory authority or acted contrary to law or the Constitution."

The CHIEF JUSTICE points to the fact that the Attorney General with due authority appointed Honorable Charles B. Sears "an experienced judge formerly of the Court of Appeals of New York," to act as an inspector and hear evidence on the charges. It is said that the hearing extended over a period of more than three months and that both sides were fully heard. Judge Sears finds that both of the organizations of which Bridges was a member believed in and advocated the overthrow of the government of the United States by force; that those findings were not challenged, and that Bridges was subject to deportation.

The CHIEF JUSTICE summarizes

the voluminous evidence and the long history of the controversy and says "On this record we have only a single question to decide. Was there some evidence supporting the findings of Judge Sears and the Attorney General that Bridges was a member of the Communist Party? If there was, then, as we have said, we have no further function to perform and the judgment must be affirmed."

The case was argued by Mr. Richard Gladstein and Mr. Lee Pressman for Bridges and by Mr. Solicitor General Fahy for Wixon.

Sherman Antitrust Act — Competition — Monopolies

U. S. Alkali Export Assn. v. U. S. and California Export Assn. v. Same, 89 L. ed. Adv. Ops. 1077; 65 Sup. Ct. Rep. 1120; U. S. Law Week 4440. (Nos. 1016, 1017, argued May 1 and 2, decided May 21, 1945).

This suit was brought by the United States in the District Court for the Southern District of New York to restrain violation of Section 4 of the Sherman Antitrust Act. The defendants are domestic and foreign corporations, alleged to be engaged in a conspiracy to eliminate exports of alkalis from the foreign market of the conspiracy to the United States; to restrict production of, to prevent competition in and eliminate export by domestic producers of alkalis in the United States, and to fix prices of caustic soda in the United States.

Defendants moved to dismiss the complaint on the ground that exclusive jurisdiction of the matters charged in the complaint is vested, in the first instance, in the Federal Trade Commission under § 1, 2, and 5 of the Webb-Pomerene Act. The district court denied the motion. The Supreme Court granted certiorari to review the order of the district court in refusing to dismiss the case.

Defendants did not question the district court's ruling that the complaint alleges violations of the Sherman Act and that the defendants were not within any immunity secured by the Webb-Pomerene Act.

Their sole contention was that § 5 of the Webb-Pomerene Act deprived the district courts of jurisdiction in Sherman Act cases until the Commission had made its investigation and recommendations and the defendant Associations had failed to comply with them, and the Commission had referred its findings and recommendations to the Attorney General.

The judgment of the district court was affirmed. The opinion of the Court was delivered by the CHIEF JUSTICE.

The scope and purpose of the Webb-Pomerene Act on proceedings under the Sherman Act was first examined, with particular attention to the ascertainment of the intent of Congress as to the methods of review prescribed by that Act, and it is said: "The questions now presented involve the propriety of the exercise, by the district court, of its equity jurisdiction, and an asserted conflict between its jurisdiction and that of an agency of Congress said to be charged with the duty of enforcing the anti-trust laws in the circumstances of the present case."

The consequences of its refusal to review the action of the district court in such cases is weighed and the CHIEF JUSTICE says, "... we think the case is an appropriate one for review of the district court's order by certiorari, and we pass to the consideration of the merits."

After consideration of the relevant legislation the CHIEF JUSTICE says "the violations here alleged are not violations of the Webb-Pomerene Act but of the Sherman Act, and it is the latter which provides for suits to be brought by the United States." The legislative history of both acts is further taken up with a view to ascertaining whether or not the district courts and the commissions are given concurrent jurisdiction, and it is said, "But even if the case were one of concurrent jurisdiction, we cannot assume that there would be any unseemly conflict between the Commission and the Department of Justice. Congress has found no such objection to the concurrent jurisdic-

tion to enforce the provisions of the Clayton Act to which we have referred."

The final conclusion of the Court was stated by the CHIEF JUSTICE as follows: "We conclude that the United States was authorized to bring this suit, and that the Commission's powers conferred by § 5 of the Webb-Pomerene Act do not preclude the suit before the Commission has acted."

Mr. Justice ROBERTS concurs in this opinion in respect of the Court's exercise of jurisdiction to review the action of the district court but dissents from the decision that the district court had power to hear the case in the absence of an investigation and recommendation by the Federal Trade Commission.

The case was argued by Mr. Wm. Dwight Whitney for U. S. Alkali Export Association and by Mr. Wendell Berge for the United States.

Federal Communications Act—Relative Jurisdiction of Administrative Agencies and the Courts for Judicial Review of Administrative Orders

Radio Station WOW, Inc. v. Johnson, 89 L. ed. Adv. Ops. 1397; 65 Sup. Ct. Rep. 1475; U. S. Law Week 4568. (No. 593, argued March 1, decided June 18, 1945).

Woodmen of the World Life Insurance Society, a fraternal benefit association of Nebraska, owns Radio Station WOW. The Society leased this station for fifteen years to Radio Station WOW, Inc., a Nebraska corporation formed to operate the station as lessee. After the Society and the lessee had jointly applied to the Federal Communications Commission for consent to transfer the station license, Homer H. Johnson, a member of the Society, filed this suit in a Nebraska State Court to have the lease and the assignment of the license set aside for fraud. While this suit was pending the Federal Communications Commission consented to assignment of the license and the Society transferred both the station properties and the license to the

lessee. Thereafter, the Society answered that the Federal Communications Commission had no jurisdiction over the subject matter of the action except to authorize or disapprove the assignment of the license and until, after full and complete showing, the Commission had exercised that jurisdiction in the approval of the transfer.

The trial court found that there had been no fraud and dismissed the suit.

The Supreme Court of Nebraska, three judges dissenting, reversed and entered judgment for plaintiff Johnson and directed that the lease and license be set aside and the original position of the parties be restored "as nearly as possible." The judgment further ordered an accounting of the operation of the station by the lessee and that the income less operating expenses be returned to the Society.

The Society moved for rehearing and asserted that only the Federal Communications Commission and the federal court had jurisdiction over the subject matter. The motion for rehearing was denied but in clarification of its former decision the Supreme Court of Nebraska said, "The effect of our former opinion was to vacate the lease of the radio station and to order the return of the property to its former status, the question of the federal license being a question solely for the Federal Communications Commission. Our former opinion should be so construed."

Certiorari to the Supreme Court of Nebraska was allowed on the question "whether the judgment is a final one and whether the federal questions raised by the petition for certiorari are properly presented by the record", and the judgment of the Supreme Court of Nebraska was reversed.

The opinion of the Court was delivered by Mr. Justice FRANKFURTER and it is explained that certiorari was allowed and limited to the two questions above referred to because of the importance of the contention that the state court's decision had in-

vaded the domain of the Federal Communications Commission.

Dealing with the fundamental attitude of the Supreme Court toward questions of conflict like the one here arising, Mr. Justice FRANKFURTER says: "Since its establishment, it has been a marked characteristic of the federal judicial system not to permit an appeal until a litigation has been concluded in the court of first instance. . . . Only in very few situations. . . . has there been a departure from this requirement of finality for federal appellate jurisdiction", and it is said that this view derives added force "when the jurisdiction of this Court is invoked to upset the decision of a state court."

It is pointed out that potential conflict between the courts of two different governments here arises and that Congress has granted to the Supreme Court power to intervene in state litigation only after "the highest court of a State in which a decision in the suit could be had," has rendered a final judgment.

This requirement for final judgment before the court can intervene was declared to be no mere technicality but to be "an important factor in the smooth working of our federal system."

Having thus given due weight to the requirement of final decision in state tribunals before the federal court undertakes review, it is declared that "appealable finality has a penumbral area," and that the means of determining when a litigation is concluded so as to be "final" and therefore reviewable arises in this case because the Nebraska Supreme Court not only directed a transfer of property, but also ordered an accounting of profits derived from the radio property. Cases which seem to support the pendency of an accounting as a temporary bar to review are considered and it is said that the rationale of those cases is that a judgment directing immediate delivery of physical property is reviewable and is to be deemed dissociated from a provision for an accounting even though the account-

ing is decreed in the same order. The opinion then passes to the ascertainment of what federal questions are here involved. Those questions are considered, the state questions are separated from the federal questions, the respective power of the state and of the federal agencies and the federal court are examined, and Mr. Justice FRANKFURTER says, "We think that state power is amply respected if it is qualified merely to the extent of requiring it to withhold execution of that portion of its decree requiring retransfer of the physical properties until steps are ordered to be taken, with all deliberate speed, to enable the Commission to deal with new applications in connection with the station. Of course, the question of fraud adjudicated by the state court will no longer be open insofar as it bears upon the reliability as licensee of any of the parties." The cause was remanded for further proceedings in conformity with this opinion.

Mr. Justice DOUGLAS concurs in the result.

Mr. Justice ROBERTS is of the opinion that the judgment should be affirmed.

Mr. Justice BLACK took no part in the consideration of this case.

Mr. Justice JACKSON filed a dissenting opinion. The basis of his dissent is the possibility of conflict between the judgment rendered by the state court of Nebraska and the Federal Communications Commission. He points out that the conflict can only occur if the Federal Communications Commission should hold that the federal public interest requires the radio station to be "kept in the hands of those who are adjudged to be guilty of fraud, and that the public interest cannot be served by those who have been adjudged to have been victims of that fraud although they had operated the station for many years with success and without any question as to the public interest."

Mr. Justice JACKSON thinks that this conflict is not likely to arise, but that if it did the judgment of the

Nebraska court would still be good; that it has the power to compel restitution of property obtained from its operation in violation of its laws, and that the state has power "to strip the wrongdoers of every fruit of the wrong including the value of the federal license even if the license itself cannot be obtained", and for those reasons he would affirm the judgment of the Nebraska court and "leave the problem of conflict to be dealt with when and if it arises."

The case was argued by Mr. James Lawrence Fly for WOW, Inc., et al. and by Mr. Don W. Stewart for Johnson.

Fair Labor Standards Act—Definition of "Work"

Jewell Ridge Coal Corporation v. Local No. 6167, 89 L. ed. Adv. Ops. 1543; 65 Sup. Ct. Rep. 1550; U. S. Law Week 4389. (No. 721, argued March 9, decided May 7, 1945. Rehearing denied June 11, 1945).

This case involves the application by two bituminous coal mines of the principles declared in the *Tennessee Coal Company* case. (30 A.B.A.J. 123, 290).

There is debate between the members of the Court as to whether the factual differences in the two cases require a different result or whether the Court must follow its earlier adjudication in the *Tennessee* case, where it was held that the underground travel there involved constituted "work" compensable under the Fair Labor Standards Act.

This was a declaratory judgment action brought by the employer corporation against the mine workers organization and others, for a declaration that the employees had been properly compensated and were not entitled to additional payment for underground travel between the portal and the face of the work and for a declaration as to what amount, if any, was due and unpaid to the employee.

After hearing evidence and argu-

ment, the district court concluded that the employer had correctly computed the amounts due to miners, and that they were not entitled to compensation for underground travel from the portal of the mine to the face of the work and back to the portal. The district court entered judgment against the plaintiffs, but it should be noted that the judgment of the district court in this case was entered before the decision of the Supreme Court in the *Tennessee Coal* case.

The Circuit Court of Appeals held that the *Tennessee Coal* case could not be distinguished from this case and accordingly reversed the judgment.

The Supreme Court took the case on certiorari and affirmed the decision of the Circuit Court of Appeals.

The opinion of the Court was delivered by Mr. Justice MURPHY.

On the authority of the *Tennessee Coal* case, and because of agreement with the Circuit Court of Appeals in this case he holds that the workmen in this mine are entitled to the compensation claimed.

The final conclusion reached by Mr. Justice MURPHY is stated as follows: "We are here dealing solely with a set of facts that leaves no reasonable doubt that underground travel in petitioner's two bituminous coal mines partakes of the very essence of work."

Mr. Justice JACKSON delivered a dissenting opinion in which the CHIEF JUSTICE, Mr. Justice ROBERTS and Mr. Justice FRANKFURTER joined.

The grounds of the dissent are that the decision either invalidates collective bargaining agreements which govern the matter or ignores their explicit terms.

In support of this thesis it is shown that these two mines have been operated by labor organizations; that these organizations have been represented throughout by an authorized bargaining representative and that for many years, rates have been fixed as a result of the bargains reached by the representatives of the union and by the management in

which the underground travel in question was excluded from the work for which payment was allowed and paid. And it is said that "now at the first demand of employees the Court throws these agreements overboard, even intimating that to observe agreements, bargained long before enactment of the Fair Labor Standards Act, would be 'legalizing' a circumvention of the statutory scheme'."

The dissenting opinion declines to accept the claimed parallelism of the *Tennessee Coal* case with the instant case and points out what the dissenting justices consider to be important factual and legal differences. On these points evidence is extensively reviewed.

In the closing paragraphs of the dissenting opinion Mr. Justice JACKSON says: "We cannot shut our eyes to the consequence of this decision which is to impair for all organized labor the credit of collective bargaining, the only means left by which there could be a reliable settlement of marginal questions concerning hours of work or compensation," and the doubt is expressed whether one can find "in the long line of criticized cases one in which the Court has made a more extreme exertion of power or one so little supported or explained by either the statute or the record in the case."

A petition for rehearing having been filed and denied without opinion, Mr. Justice JACKSON considered it appropriate to disclose "the limited grounds" on which he concurred in the denial of the rehearing. He declares that the unusual feature of the petition for rehearing is that it suggests to the Court a question as to the qualification of one of the Justices to take part in the decision of the cause. On the question of the basis for the disqualification of a Justice of the Supreme Court, Mr. Justice JACKSON says that no statute prescribes for disqualification and that the Court itself has never undertaken to promulgate any uniform practice on the subject. It is therefore said that it appears always to

have been considered that it is "the responsibility of each Justice to determine for himself the propriety of withdrawing in any particular circumstances." For these reasons Mr. Justice JACKSON concurs in the denial of the petition for rehearing. Mr. Justice FRANKFURTER also concurs in the above statement.

The case was argued by Mr. George Richardson, Jr. and Mr. William A. Stuart for Jewell Ridge Coal Corporation and by Mr. Crampton Harris for Local No. 6167.

Fair Labor Standards Act—Applicability to Employees Engaged in Activities Relating to the Maintenance and Operation of a Building

Borden Co. v. Borella, 89 L. ed. Adv. Ops. 1240; 65 Sup. Ct. Rep. 1223; U. S. Law Week 4493. (No. 688, argued April 6, decided June 11, 1945).

This case and a companion case deal with the application of the Fair Labor Standards Act to employees engaged in the maintenance and operation of a building. Both cases deal with a slightly different situation from that considered in the *Kirschbaum* case (316 U. S. 517). In that case it was held that the Act applies to building employees, working in a warehouse in which quantities of goods for interstate commerce were physically produced. In this, the *Borden Co.* case, porters, elevator operators and night watchmen in a 24-story office building in the business district of New York City were also held to be subject to the provisions of the Fair Labor Standards Act.

The building in question is owned and operated by the Borden Co., a New Jersey corporation engaged in the manufacture of milk products. That company occupies approximately seventeen of the twenty-four floors and 58% of the total rental area. The remainder of the office space is leased to various tenants, none of which were found by the district court "to produce, manu-

facture, handle, process or in any other manner work on any goods in the building."

The Borden Company has manufacturing plants and factories in the United States and Canada and its products are sold in large volume throughout this and other countries. Those establishments are admittedly engaged in the production of goods for interstate commerce. The space occupied in the New York building in question is devoted to the supervision, management and control of the entire Borden enterprise, but no manufacturing is done there. The manufacturing processes, however, are controlled and coordinated by the corporate officers and employees.

This suit was brought against the Borden Company to recover overtime compensation and liquidated damages plus reasonable attorneys' fees under the authority of the Fair Labor Standards Act. The district court denied relief, holding that under the rule of the *Kirschbaum* case the porters, elevator operators and night watchmen employed in that building were not entitled to the benefit of the Fair Labor Standards Act. The Second Circuit Court of Appeals reversed this judgment. Certiorari was allowed "because of the importance of the issue and the application of the *Kirschbaum* doctrine", and the judgment of that court was affirmed.

Mr. Justice MURPHY delivered the opinion of the Court. The opinion points out that under Section 7 (a) of the Act overtime compensation must be paid to all employees "engaged in commerce or in the production of goods for commerce."

As to employees "engaged in the production of goods for commerce" the opinion declares that "it is unnecessary that they directly participate in the actual process of producing goods inasmuch as Section 3 (j) provides that 'for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed . . . in any process or occupation necessary to the production thereof, in any State' . . ."

Mr. Justice MURPHY accordingly states the problem as the determination "whether the respondent maintenance employees are engaged in a process or occupation necessary to the production of goods for commerce so as to come within the ambit of Section 7 (a)."

The *Kirschbaum* case is summarized and other pertinent decisions are cited and Mr. Justice MURPHY says "the only distinction between this and the *Kirschbaum* case lies in the fact that here the employees work in a building where production of goods is administered, managed and controlled rather than carried on physically." It was held, however, that "this distinction is without economic or statutory significance and that it cannot form the basis for concluding that the respondent employees are engaged in occupations unnecessary to the production of goods for commerce."

The opinion discusses the economic point of view and reaches the conclusion that "From a productive standpoint, therefore, petitioner's executive officers and administrative employees working in the central office building are actually engaged in the production of goods for commerce just as much as are those who process and work on the tangible products in the various manufacturing plants."

Summarizing the relation of this case to the *Kirschbaum* case, Mr. Justice MURPHY says that there is nothing in the interpretative principles laid down in the *Kirschbaum* case which constitutes any basis for holding that the respondent employees are not "necessary" to petitioner's production, and in closing it is said that the Company's office is "part of an integrated effort for the production of goods."

Mr. Justice FRANKFURTER concurred in the result.

The CHIEF JUSTICE delivered a dissenting opinion, in which Mr. Justice ROBERTS joined. The divergence of views is manifested by the opening sentences of the dissent in which the CHIEF JUSTICE says: "No doubt

there are philosophers who would argue, what is implicit in the decision now rendered, that in a complex modern society there is such interdependence of its members that the activities of most of them are necessary to the activities of most others. But I think that Congress did not make that philosophy the basis of the coverage of the Fair Labor Standards Act."

The language of the Fair Labor Standards Act is examined. The statutory definition therein contained of the word "production" is noted, and the emphasis laid upon participation in the process of occupation necessary to production is emphasized. The *Kirschbaum* case is examined and it is declared that "nothing then decided or said seems to me to justify our saying that the elevator men and other maintenance employees in an office building, in which no manufacturing is done, either participate in or are necessary to the manufacturing process, because tenants of its building are executive or administrative officers of a company which does manufacturing elsewhere." Emphasis is laid upon the proposition that the occupation must be necessary to the "physical process of production", and the CHIEF JUSTICE says, "The manufacturing process could proceed without many activities which are necessary or convenient to the executive officers of a manufacturing company but which do not in any direct or immediate manner contribute to the manufacturing process . . .". In further illustration of this point of view the CHIEF JUSTICE says, "The services rendered in this case would seem to be no more related, and no more necessary to the processes of production than the services of the cook who prepares the meals of the president of the company or the chauffeur who drives him to his office . . . I would reverse the judgment."

10 East 40th Street Bldg. v. Callus et al., 89 L. ed. Adv. Ops. 1244; 65 Sup. Ct. Rep. 1227; U. S. Law Week 4516. (No. 820, argued April 6, decided June 11, 1945).

Like the Borden case, it involves

the question whether or not maintenance employees of a building are engaged in commerce or in the production of goods for commerce within the meaning of the Fair Labor Standards Act. Employees of the building in question were elevator starters and operators, window cleaners, watchmen and the like. They brought this suit under 16 (b) of the Fair Labor Standards Act for claims for overtime payment to which they are entitled if their occupations be deemed to be "necessary for the production of goods for commerce." The District Court dismissed the suit. The Circuit Court of Appeals reversed. Certiorari was allowed, and the decision of the Circuit Court of Appeals was reversed.

The opinion of the Court was delivered by Mr. Justice FRANKFURTER. The facts stated in the opinion may be briefly summarized as follows: The building in question is a 48-story New York office building. The offices are leased to more than a hundred tenants pursuing a great variety of enterprises, including executive and sales offices of manufacturing and mining concerns, sales agencies, engineering and construction firms, advertising and publicity offices, law firms, investment and credit associations, and the United States Employment Service. The building is devoted exclusively to offices and no manufacturing is carried on within it. The plaintiffs were maintenance employees of the building. After a consideration of the record and the contention of the parties Mr. Justice FRANKFURTER compares certain features of this case with the *Borden* case and says: "An office building exclusively devoted to the purpose of housing all the usual miscellany of offices has many differences in the practical affairs of life from a manufacturing building, or the office building of a manufacturer. And the differences are too important in the setting of the Fair Labor Standards Act not to be recognized by the courts."

Continuing the examination of the differences between this case and

the *Kirschbaum* case, he declares that the necessity of drawing lines cannot be escaped and when the lines have to be drawn they are bound to appear arbitrary. His conclusion is that the drawing of accurate lines excludes this case from the reasoning of the *Kirschbaum* case and compels a different conclusion from that reached in the *Borden* case.

The CHIEF JUSTICE says: "The views I expressed in my dissent in No. 688, *Borden Company v. Borella*, would, if accepted, control the decision in this case. As those views have been rejected by the Court, I join in the Court's opinion in this case."

Mr. Justice MURPHY delivered a dissenting opinion, in which Mr. Justice BLACK, Mr. Justice REED, and Mr. Justice RUTLEDGE joined.

In the final paragraph of the dissent its basis is clearly expressed as follows: "When Congress said that employees 'necessary to the production' of goods for commerce were to be included within the Act, it meant just that, without limitation to those who were necessary only to the physical manufacturing aspects of production. Under such circumstances it is our duty to recognize economic reality in interpreting and applying the mandate of the people."

Case No. 688 was argued by Mr. John A. Kelly for *Borden Co.* and by Mr. A. H. Frisch for *Burke, Cross, Borella, et al.*

Case No. 802 was argued by Mr. Joseph M. Proskauer for 40th Street Building, by Mr. Monroe Goldwater for *Callus, Said, and Saggese, et al.* and by Miss Bessie Margolin for *L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor*, in Nos. 688 and 802, as *amicus curiae*, by special leave of Court.

Railroads—Regulation of Interstate and Intrastate Passenger Rates of Fare—Power of Interstate Commerce Commission to Fix Intrastate Rates
North Carolina et al. v. United

States, et al., 89 L. ed. Adv. Ops. 1287; Sup. Ct. Rep. 1260; U. S. Law Week 1522. (Nos. 560, 561, argued April 23 and 24, decided June 11, 1945).

In this case, and its companion case, *Alabama v. United States*, Nos. 574 and 592, the Supreme Court considers an order of the Interstate Commerce Commission authorizing certain rail carriers to charge a rate of 2.2 cents per passenger mile for coach travel in intra-state commerce, notwithstanding that the state commission had prescribed a maximum rate of 1.65 cents per passenger mile.

The Interstate Commerce Commission acted in the exercise of power conferred by § 13 (4) of the Interstate Commerce Act which empowers it to prescribe intra-state railroad rates, after full hearing, if it finds that the state-prescribed rates cause: (1) undue or unreasonable advantage, preference or prejudice, as between persons or localities in intra-state commerce on the one hand and interstate commerce on the other hand; or (2) undue, unreasonable or unjust discrimination against interstate commerce. In both cases, three-judge federal district courts sustained the federal agency's order. But on appeal, the judgments were reversed by the Supreme Court. Mr. Justice BLACK delivered the opinion of the Court.

On the question of prejudice against interstate passengers, the Commission, noting that the interstate rate was 2.2 cents per passenger mile against an intra-state rate of 1.65 cents per mile, concluded that the latter was unduly prejudicial against interstate passengers. It took the position that the federal law requires uniformity of rates, interstate and intra-state. This construction the Supreme Court rejects as contrary to the words of the Act, inconsistent with its legislative history and contrary to the ruling in the *Shreveport* case, 234 U. S. 342, which was the practical basis for the enactment of the Act.

Dealing with the question of discrimination against interstate commerce, the Court notes that the Com-

mission concluded that intra-state traffic was not contributing its fair share of revenue required to enable the railroads to render adequate and efficient transportation service. While this conclusion would, if based on findings supported by evidence, suffice to validate the order, the Court concludes that the findings were inadequate therefor. Indeed, the Court observes that the evidence was sufficient "to show that the Commission might have found, had it made any findings on the subject at all, that a 1.65 cents rate for these four North Carolina railroads would have been a fair coach passenger contribution to revenues required to enable them to operate profitably and efficiently".

Mr. Justice REED delivered a dissenting opinion in Nos. 560 and 561, in which the CHIEF JUSTICE, Mr. Justice ROBERTS and Mr. Justice FRANKFURTER joined, which opinion was referred to as the basis for their dissent in Nos. 574 and 592 also.

The cases were argued by Mr. F. C. Hillyer and Mr. J. C. B. Ehringhaus for North Carolina et al. and by Mr. J. Stanley Payne for Interstate Commerce Commission, and by Mr. Charles Clark for Aberdeen and Rockfish R. R. Co. et al. in No. 560; case submitted by Mr. Richard H. Field, Mr. David F. Cavers, and Mr. Malcolm D. Miller for Davis in No. 561.

Price Administration—Ceiling Price—Construction of Regulations

Bowles, Administrator, etc. v. Seminole Rock & Sand Co., 89 L. ed. Adv. Ops. 1186; Sup. Ct. Rep. 1215; U. S. Law Week 4459. (No. 914, argued April 26 and 27, decided June 4, 1945).

The vendor, Seminole Rock and Sand Co., contracted in October, 1941, to furnish the Seaboard Railway crushed stone on demand at 60 cents per ton, to be delivered when called for by Seaboard, and this stone was actually delivered in March, 1942. In January, 1942, Seminole contracted to sell like crushed stone to

a government contractor at \$1.50 a ton, deliverable when needed, and actually delivered, in part, in January. The next deliveries under the latter contract occurred in August, 1942.

The question for decision is whether the 60 cents per ton rate or the \$1.50 rate constitutes the ceiling price under the OPA regulations. They provide, § 1499.153 (a) that the ceiling price shall be "the highest price charged . . . during March, 1942," for the article in question. Section 1499.163 (a) (2) goes on to define "highest price charged during March, 1942," to mean "(i) The highest price which the seller charged to a purchaser of the same class for delivery of the article or material during March, 1942." The definition in (ii) and (iii) covers contingencies not covered by (i), but since the Court holds (i) applicable the others may be presently disregarded.

The Administrator argued that since there was an actual delivery in March, 1942, the case falls within (i) in determining the ceiling price. Seminole argued that there must be both a charge and a delivery in March, 1942, to fix the ceiling according to (i).

The District Court and the Circuit Court of Appeals held for Seminole. On certiorari the judgment was reversed by the Supreme Court. Mr. Justice MURPHY delivered the opinion of the Court. He points out that the phrase "highest price charged during March, 1942" might be construed to mean only actual charges or sales in March, regardless of delivery dates, or it might refer only to charges made for actual delivery in March. But the opinion adds: "rule (i) adopts the highest price which the seller 'charged . . . for delivery' of an article during March, 1942. The essential element bringing the rule into operation is thus the fact of delivery during March. If delivery occurs during that period the highest price charged for such delivery becomes the ceiling price. . . . We can only conclude, therefore, that for purposes of rule (i) the high-

est price charged for an article delivered during March, 1942, is the seller's ceiling price regardless of the time when the sale or charge was made."

The opinion emphasizes the controlling weight to be given to the administrative construction of the regulations, as distinguished from the legality of the result reached by the agency.

Mr. Justice ROBERTS agreed with the Circuit Court of Appeals.

The case was argued by Mr. Henry M. Hart, Jr. for Bowles pro hac vice, and by Mr. Robert H. Anderson for Seminole Co.

Public Utilities—Rate Regulation—Jurisdiction of Interstate Commerce Commission over Bus Lines Operating Between Points in Virginia and Points in the District of Columbia

United States et al. v. Capital Transit Co., et al., 89 L. ed. Adv. Ops. 1175; 65 Sup. Ct. Rep. 1176; U. S. Law Week 4449. (No. 663, argued April 3, decided May 28, 1945).

The Interstate Commerce Commission, on request of the Secretaries of War and of the Navy, investigated the reasonableness of fares of four carriers transporting passengers by bus between points in the District of Columbia and nearby points in Virginia, where large military and naval offices and installations employ more than 40,000 government workers. The fares were not identical on the four lines, but the several lines performed substantially the same transportation. The Commission, after hearing, revised the rate structures and ordered the institution of certain transfer privileges.

A three-judge court set aside the order for lack of jurisdiction and failure of the Commission to make adequate findings. On appeal the Supreme Court reversed the judgment. Mr. Justice BLACK delivered the opinion of the Court.

Jurisdiction to regulate the transportation is sustained under § 230 (b) of the Motor Carrier Act. While

the Commission's jurisdiction does not extend to transportation "wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities . . .", the Court emphasizes that the Act confers jurisdiction with respect to the excepted zones where "such application is necessary" to carry out the national transportation policy declared by the Act. The declaration of policy contains a clause embracing the development, coordination and preservation of a national transportation system "to meet the needs . . . of the national defense". On the findings, jurisdiction is sustained under § 230 (b), taken in conjunction with this declaration of policy.

Jurisdiction to prescribe joint fares and to require the issuance of transfers as a means of effecting the same is founded on § 216 (c) and (e) of the Act.

Mr. Justice ROBERTS was of the opinion that the Commission had no jurisdiction of the fares in question, for the reasons set forth in the opinions below, 55 F. Supp. 51 and 56 F. Supp. 670.

Mr. Justice REED and Mr. Justice DOUGLAS dissented from the second part of the opinion, i. e., the portion dealing with joint fares.

The case was argued by Mr. Paul A. Freund for the United States, by Mr. Daniel W. Knowlton for Interstate Commerce Commission, by Mr. Robert E. Quirk for Alexander Barcroft & Washington Transit Co. et al., and by Mr. Henry E. Ketner for State Corporation Commission of State of Virginia.

Railway Labor Act of 1934—Finality of Award by National Railroad Adjustment Board

Elgin, Joliet and Eastern Ry. Co. v. Burley, et al., 89 L. ed. Adv. Ops. 1328; 65 Sup. Ct. Rep. 1282; U. S. Law Week 4482. (No. 160, argued November 15, 1944, decided June 11, 1945).

The railroad took over switching

operations in an industrial plant at Whiting, Indiana, which had theretofore been performed by the industry. When this occurred the industrial crews joined the Brotherhood of Railroad Trainmen, and a dispute arose over whether starting time provisions in a collective bargaining agreement, previously made between railroad and brotherhood, governed the switching crews working in the plant. This dispute was submitted to the Brotherhood, with authority of the employees, to the Adjustment Board to determine whether Section 6 of the agreement governed, but no monetary damages were claimed. Representatives of the union accepted an offer of settlement. Thereafter the individual employees here involved claimed overtime for certain periods they had been required to work in alleged violation of Section 6, and the union filed another claim on their behalf with the Adjustment Board. The Board ruled that the claim had been disposed of by the prior settlement. In a suit brought by the employees individually in the federal court for damages, the trial court gave summary judgment for the railroad. The Circuit Court of Appeals reversed. On certiorari, the judgment was affirmed by the Supreme Court. Mr. Justice RUTLEDGE delivered the opinion of the Court.

The opinion examines the relevant provisions of the statute and emphasizes the difference in procedures prescribed for the making of collective agreements constituting the major area of disputes in the field of railroad labor, and procedure relating to disputes over or arising out of the meaning or application of various provisions of existing agreements. This analysis led to the conclusion that the statute does not, of itself, require the individual employee to be bound by the action of the union in the handling of a grievance or individual claim.

Further analysis of the situation here led to the conclusion that the record fails to show that the employees had authorized the settlement. Hence, the cause was remanded for further proceedings to determine

whether the employees had legally authorized the union to represent them in such a manner as to bind them to the terms of the settlement which was the basis for denial of the claim for money "penalty" or damages.

Mr. Justice FRANKFURTER delivered a dissenting opinion in which the CHIEF JUSTICE, Mr. Justice ROBERTS and Mr. Justice JACKSON joined.

The case was argued by Mr. Paul R. Conaghan for Elgin, Joliet and Eastern Railway and by Mr. John H. Cately for Burley et al.

State Regulation of Qualifications of Union Agent and of Activities of Labor Union—Relation to National Labor Relations Act

Hill et al. v. Florida, 89 L. ed. Adv. Ops. 1258; 65 Sup. Ct. Rep. 1564; U. S. Law Week 4529. (No. 811, argued April 4 and 5, decided June 11, 1945).

The question for decision in this case was whether a statute of Florida regulating labor union activities has been applied in a manner bringing it into conflict with the collective bargaining regulations of the National Labor Relations Act.

The Florida Act provides in Section 4 that no one shall act as business agent for pecuniary reward for a labor union without obtaining a state license as required by the Act. No one may be so licensed who has not been a citizen of the United States for more than ten years, who has been convicted of a felony, or who is not a person of good moral character. Licenses are issued by a board composed of the Governor, Secretary of State and the Superintendent of Education, and are issued if the Board finds that the applicant meets the statutory standards.

Section 6 requires each union operating in the state to file a written report with the Secretary of State disclosing its name, the location of its offices and the names and addresses of its officers.

Both the agent, Hill, and the union were charged with violation

of Section 4 and Section 6 respectively and the state sought injunctive relief against them. The Supreme Court of Florida sustained the Florida Act and granted the relief sought. On certiorari, the Supreme Court reversed. Mr. Justice BLACK delivered the opinion of the Court.

The opinion emphasizes that the provisions of Section 4 circumscribe the "full freedom" which the Wagner Act confers on workers in the selection of collective bargaining agents of their own choice. The conclusion is reached that "Section 4 of the Florida Act is repugnant to the National Labor Relations Act."

Section 6 was found to stand no better than Section 4. In this connection it is stressed that it is not the requirement relating to the filing of information by the union that conflicts with the federal law, but the sanctions imposed for failure to comply with the state requirements. The penalties that might be incurred for violation of the latter—injunction and criminal punishment—constitute obstacles to collective bargaining that cannot be created consistently with the Wagner Act.

The CHIEF JUSTICE delivered a separate opinion concurring as to the holding regarding Section 4 but dissenting from the portion of the opinion dealing with Section 6 of the Florida Act.

The case was argued by Mr. Herbert S. Thatcher and Mr. Joseph A. Padway for Leo H. Hill and United Association of Journeymen Plumbers and Steamfitters and by Mr. Howard S. Bailey and Mr. J. Tom Watson for State of Florida.

New York Civil Rights Law—Application to Railway Mail Clerk's Association

Railway Mail Association v. Corsi et al., 89 L. ed. Adv. Ops. 1435; 65 Sup. Ct. Rep. 1483; U. S. Law Week 4576. (No. 691, argued April 3, decided June 18, 1945).

The Railway Mail Association, a New Hampshire corporation, with a membership of 22,000 postal clerks of

the United States Railway Mail Service, challenged the validity of Section 43 and related Sections 41 and 45 of the New York Civil Rights Law by suit against the State Industrial Commission. They provide under penalty that no labor organization shall deny a person membership by reason of race, color or creed or discriminate against any member by reason thereof. Article III of the Association's constitution limits the membership to members of the Caucasian race and to native American Indians.

The Association contended that it is not a "labor organization" subject to these Sections and that, if held to apply, they violate the due process and equal protection clauses of the Fourteenth Amendment to the Constitution, and are in conflict with the federal power over post offices and post roads.

The New York Court of Appeals, after examination of the nature and function of the Association, concluded that the Association is a labor organization, within the meaning of the state law, and rejected the contentions that the requirements of the state law are in conflict with any federal statutory or constitutional provision.

On appeal, the Supreme Court affirmed. Mr. Justice REED delivered the opinion of the Court. He says that to hold that the legislation violates the due process clause "would be a distortion of the policy manifested in that amendment which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color."

The contention that the legislation violates the equal protection clause rests on the fact that "employees of the state" are excluded from the operation of the provisions relating to collective bargaining. This contention is also rejected. "A state does not deny equal protection because it regulates the membership of appellant but fails to extend to organizations of government employees provisions relating to collective bargaining."

Also rejected were contentions

that the state legislation invades federal power over postal matters and that it is excluded from a field occupied by federal statutes.

Mr. Justice FRANKFURTER delivered a brief concurring opinion. Mr. Justice RUTLEDGE concurred in the result.

The case was argued by Mr. Daniel J. Dugan for the Railway Mail Association and by Mr. Wendell P. Brown for Corsi.

Sherman Anti-Trust Act—Application to Labor Union Acting in Conjunction with Employer Groups to Control Prices and Markets

Allen Bradley Co. v. Local Union No. 3 I. B. of E. W., 89 L. ed. Adv. Ops. 1441; 65 Sup. Ct. Rep. 1533; U. S. Law Week 4580. (No. 702, argued March 8 and 9, decided June 18, 1945).

The controversy here considered presents the question whether the respondent labor union and its members violated the Sherman Anti-Trust Act in aiding and abetting two employer groups—electrical contractors and electrical equipment manufacturers—in a combination and conspiracy to monopolize the electrical equipment market in New York City. Local No. 3, a union of electrical workers, has jurisdiction only over the metropolitan area of New York City. It was impossible, therefore, for it to make collective bargaining agreements with manufacturers outside the city, such as petitioner. Using the strike and boycott as weapons, the union made agreements obligating contractors to purchase only from local manufacturers which had closed shop agreements with the Union. Manufacturers agreed to confine sales in the city to contractors employing the local union's members. The agreements expanded to industry-wide scope, looking not only to terms and conditions of employment, but to control of prices and markets. The combination became highly successful.

The District Court, in a suit for declaratory judgment brought by Allen Bradley Co., held that the com-

bination violated the Sherman Act, and entered a broad injunction. The Circuit Court of Appeals reversed, holding that there was no violation, in view of the bona fide purpose of the union to raise wages, improve working conditions and bring about better conditions of employment for the union's members. On certiorari the judgment was reversed by the Supreme Court. Mr. Justice BLACK delivered the opinion of the Court. He reviews the history of two legislative movements—one to preserve a competitive business economy and the other to preserve the rights of labor to organize to better its condition through collective bargaining. To reconcile the two policies involved in these movements is the problem posed in the present case. Concluding that the union activity here is not exempt from the condemnation of the Sherman Act, Mr. Justice BLACK points out that the existence and operation of labor associations instituted for purposes of mutual help, are not condemned by the anti-trust laws, but adds that the purposes of mutual help can hardly be thought to cover activities for the purposes of "employer-help" in controlling markets and prices.

Reviewing the legislative history of the two Acts he says that he finds no indication that "Congress ever considered or . . . determined that labor unions should be granted an immunity" such as that sought here.

The opinion points out that, although it be assumed that union members and employers may agree not to buy goods manufactured by companies not employing members of the union, that was but one element in the far larger program undertaken here to monopolize all the business in New York City and to charge the public prices above a competitive level. In a program of this character the exemptions of the Clayton and Norris-LaGuardia Acts are not applicable. The holding is described in the opinion to mean that "the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with

business groups."

The opinion concludes with a discussion of the District Court's injunction, the scope of which is found too sweeping. The reversal, therefore, is with directions to remand to the District Court to modify and clarify the judgment and injunction, consistently with the Court's opinion.

Mr. Justice ROBERTS concurred in the judgment but expressed inability to concur in the opinion, for reasons which he sets forth in a separate opinion.

Mr. Justice MURPHY delivered a brief dissenting opinion.

The case was argued by Mr. Walter Gordon Merritt for Bradley Co. and by Mr. Harold Stern for Local Union No. 3.

Sherman Anti-Trust Act—Application to Labor Union Refusing to Admit to Membership Employees of an Employer Who Resisted Strike

Hunt et al. v. Crumboch et al., 89 L. ed. Adv. Ops. 1429; 65 Sup. Ct. Rep. 1545; U. S. Law Week 4586. (No. 570, argued March 2, decided June 18, 1945).

The employers, Hunt et al., were engaged in carrying freight under contract by motor trucks in interstate commerce. They had a contract with the Atlantic & Pacific Tea Co. The union composed of drivers and haulers called a strike, in 1937, to force a closed shop on the A & P. The employers refused to unionize and attempted to operate during the strike. Violence occurred and a union man was killed. For this one member of the employer firm was tried, but acquitted. Ultimately A & P and the union made a closed shop agreement, whereupon all contract haulers working for A & P were notified that their employees must join the union, and all contract haulers, except the employers here, joined the union or made closed shop agreements with it. But the union refused to negotiate with the employer firm here, and declined to admit its employees to membership in the union. Consequently the firm's contract with the A & P was cancelled, as was one later with another concern and for the same reason, and it was forced

out of business. The employer firm brought suit in a federal court, against the union and its officers, for an injunction and treble damages under the Sherman Anti-trust Act. The District Court ruled for the union and the Circuit Court of Appeals affirmed. On certiorari the Supreme Court affirmed. The opinion of the Court was delivered by Mr. Justice BLACK. He points out that it is not a violation of the Sherman Act for laborers in combination to refuse to work or to sell or not sell their labor as they please, on their own terms, without infringement of the anti-trust laws, though to be sure they are subject to some limitations when they act in combination with employers to effect a monopoly, as in the *Allen Bradley* case, No. 702.

In the present case the personal antagonism of the union against the employers, over the killing of a union man, is found to be without legal significance in its bearing on the laborers' right to combine in their refusal to work for the employers.

Mr. Justice JACKSON delivered a dissenting opinion in which he points to the *Allen Bradley* case (No. 702) as holding that the union has no absolute immunity from the statute, and indicates that that ruling is irreconcilable with the ruling here. Moreover, the *Apex Hosiery* case, relied on by the majority, is distinguished. The CHIEF JUSTICE and Mr. Justice FRANKFURTER concurred with Mr. Justice JACKSON.

Mr. Justice ROBERTS also delivered a dissent in which the CHIEF JUSTICE, Mr. Justice FRANKFURTER and Mr. Justice JACKSON joined. In this opinion emphasis is placed upon the fact that no labor dispute was involved here, but rather an off-shoot of one. He adds that it is hardly accurate "to say that the union men decided not to sell their labor to the petitioners. They intended to drive the petitioners out of business as interstate motor carriers, and they succeeded in doing so."

The case was argued by Mr. Peter P. Zion and Mr. Hirsch W. Atalbert for Hunt and by Mr. William A. Gray for Crumboch.

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MANLEY O. HUDSON

Cambridge, Mass.

FATE AND FREEDOM. By Jerome Frank, 1945. New York: Simon and Schuster. \$3.00. Pages xiii, 375.

Stimulating is the word for this book. Not in many moons have I had such exhilarating mental exercise as reading it gave me.

Judge Frank has attempted in terms of philosophy to elaborate for Americans a personal and political credo. Although he is far too sophisticated to quote from Henley's familiar poem, his theme song is:

It matters not how strait the gate,
How charged with punishments the scroll,
I am the master of my fate,
I am the captain of my soul.

The method of approach is to trace to their sources the theory of Determinism or Inevitability in history and the belief in Predestination in religion, and then vigorously to attack the validity of these concepts. One can not help wondering why Judge Frank believes that his fellow Americans require such a vehement preaching. To me he is like Dorothy Parker's "kindly man, and serious" who

dealt in coal.

And shipped it up the Tyne, he said. Perhaps Judge Frank's calm assumption that his admonitions are needed is what makes his essay provocative in all senses of that much abused word.

Most resentful will probably be the historians. Judge Frank traces the rise of the doctrine of Inevitability to Hegel and Karl Marx, and insists that American historians became infected by taking their Ph.D.s in Germany. He quotes with agreement Henry Ford that "History is bunk". The past rises before the historian only as a dream and the actual facts can never be known; the "Time Spirit" is a deliberate invention of Hegel; there is, he dogmatizes, no such thing as the science of history.

I doubt whether American historians will agree that all these years they have been writing "just so" stories. They will probably insist that they have given weight—perhaps undue weight—to the influence of men great and not so great and to the

effect of accidents. They may remind us that even "Manifest Destiny" was a political slogan rather than an article of their creed.

The attitude of religionists toward Judge Frank's polemics will depend upon their economic views rather than upon their faith: between Catholicism and Protestantism he equally distributes the sin of promoting the rise of capitalism.

Mixed will be the emotions of some who will read with pleasure the incantations of Judge Frank as he exorcises "the old Adam" from Adam Smith and watch with delight as in righteous wrath he belabors the cadaver of laissez faire. Of these Thurman Arnold is already articulate.¹ He enjoys Judge Frank's preview of the "Utopia of means" in which mass production will assure everyone of economic security: he dissents, however, and without the emphasis of understatement, from the conclusion that as a result both labor and white collar workers will be regimented, that they will have little opportunity for economic advancement and that they will necessarily use their abundant leisure in play, pursuit of the arts or other forms of self-expression.

Even those who find themselves in agreement with Thurman Arnold are sometimes inclined to think that he says an undisputed thing in such an irritating way. For Judge Frank there is no agreement as an emollient for his irritation: "I'm not quite content to let Thurman use my book as a substitute for a soap box. He reminds me of the man in the old story who, at a funeral, said that, if no one had any remarks to make about the deceased he would talk about free silver. So Thurman as to anti-trust laws and monopoly . . . Thurman, by misinterpreting that passage and thus ascribing to me a belief in the inevitability of monopoly gave himself the opportunity to make a stump speech on his favorite theme".²

This reads like the transcript of a luncheon argument at the Graduates Club on Elm Street in New Haven. Too bad that it could not have been. Perhaps President Sey-

mour would have defended the historians and possibly Professor Corbin, if present, would have mildly added a few wise words with which no one would have disagreed.

You should read this book. It's not easy reading. Judge Frank has added seven appendices which he would better have taken the time to weave into the text. But there is an excellent index (something rarely found in American books) that is exceedingly helpful, especially when you wish to refer to the many arguments with which you disagree. Judge Frank will challenge you too, as he challenged Thurman Arnold. I hope that some of you will accept the challenge.

WALTER P. ARMSTRONG
Memphis, Tenn.

JUSTICE IN TRANSPORTATION. By Arne C. Wiprud. New York and Chicago: Ziff-Davis Publishing Co. 1945. Pages xxii, 197, with indices and appendices. \$2.50.

This book is a phenomenon of our times—an able challenge of the American system of the private ownership and operation of large-scale public utilities, under public regulation by independent and supposedly expert administrative agencies vested with quasi-judicial powers as well as plenary functions of supervision in the public interest.

The author was until lately in the Anti-trust Division of the Department of Justice and conducted the investigations into railroad rates and Interstate Commerce Commission policies and practices, which led to the suits pending in the courts of the United States. The author of the even more significant foreword was Mr. Wiprud's chief in the Anti-trust Division, and later a dynamic judge of the United States Court of Appeals for the District of Columbia. The law firm is now Arnold and Wiprud, with offices in Washington.

The ostensible defendants in the sweeping charges made in both the foreword and the book are the railroads of America, which have done

an outstanding wartime job under the difficult conditions of wartime. The actual defendants would appear to be the Interstate Commerce Commission and its expert bureaus charged with the duties of vigilance and soundness of policy, in protecting the public interests of all regions, localities, and enterprises, in the matter of railroad rates for freight. The thesis of the book is that unless the system of rate-making long in vogue can be crushed by decrees of courts, the interests of many localities and the Nation's economic development will be retarded and thwarted. The continuance of the bases and the practices developed, sanctioned or "acquiesced in", by the bureaus of the independent agency of the Government, is said to mean a laggard and unnatural economy—"our only alternative in the new transportation of the twentieth century is competition or chaos."

Both the brochure and its foreword argue brilliantly a philosophy which should be read and pondered before it is evaluated. It can be no function of a review to essay the counterargument. By way of suggesting impressions of the book, it may fairly be said that this reviewer lays it down with an uneasy feeling that somehow the power to accuse great public enterprises as well as coordinate agencies of the Government, and to hale them before judges who are in no way versed in the intricacies of the business of transportation, somehow was put into the hands of men who themselves lacked a sense of reality, a mastery of background and the "feel" of practical experience, in the field in which they crusaded with so much gusto and fervor. Basic inconsistencies seem to stand out at many stages of their argument.

Uniform class or mileage rates for equal distances are demanded by the Department of Justice and the State

1. The Saturday Review of Literature, June 23, 1945, page 10.

2. Judge Jerome Frank's Letter to the Editor. The Saturday Review of Literature, July 7, 1945, page 24.

A Book Review Goes Abroad to the War Crimes Commission

The Chief Counsel's office in the War Department did not miss the major significance of the review of Professor A. N. Trainin's book on Criminal Responsibility of the Hitlerites, which Charles Prince contributed as an outstanding feature of our July issue. ("Books for Lawyers," pages 366-68). The book is an authoritative exposition of the philosophy and point of view of the Soviet Union as to the guilt and punishment of the war criminals, and Mr. Prince's analysis and exposition were expert and useful. Photostatic copies of the review were dispatched by the War Department to Mr. Justice Robert H. Jackson and his assistants in London.

of Georgia in the suit brought in the Supreme Court of the United States, but the complaint seeks also the granting of lower rates to promote the industry and commerce of a particular region. Equality through mileage rates operates against the localities remote from the populous centers; development rates necessarily break down the rigid basis of mileage.

The suit brought by the author in the federal court in Nebraska, against the Western Rate Bureau, goes still further and seems to discard both bases contended for in the Georgia suit. Rates would be fixed by competitive negotiations between individual railroads and individual shippers—let him get the lowest rates who can wield a traffic club big enough to force the railroads to give it to him. This seems to be an abandonment of theories and principles, even of equities, in the intricate business of rate-making, where a sense of certainty and at least a considerable degree of continuity are as essential for the manufacturer and shipper as for the common carriers. It was long ago said that "The man who makes the rates makes the map", but Mr. Wiprud does not show that communities or investors in productive enterprises could safely be left

to the mercy of their dealings with a particular railroad or to the vicissitudes of rate changes produced by political or other pressures for development rates for particular areas.

All things considered, the book hardly makes a convincing case for upsetting a delicate and complex structure of rates, or for resorting to the courts to do violence, not only to the rail-

roads, but also to the orderly system of regulation which is the product of the industrial statesmanship of such experts as the late Joseph T. Eastman. As often, the sound public policy and the advisable lines of progress by conference seem likely to be found somewhere between the two extremes of current views.

A HOUSE DIVIDING. By William E. Baringer. 1945. Springfield, Illinois: The Abraham Lincoln Association. \$4.00. Pages ix, 356.

The year I was itinerant missionary for the American Bar Association I spent a day in Springfield, Illinois. My host was the late Logan Hay, who lost no time in suggesting that we visit all the places associated with the memory of Lincoln. Solemnly I reminded him of my heredity and environment; that I had never had a relative north of Mason and Dixon line actual or projected; that on the single occasion when some of the members of my family decided to move northward they were somewhat rudely received in Pennsylvania—at Gettysburg. There was no audible reply, but I was gently guided to the waiting automobile.

Logan was inscrutably wise, and I never knew whether he sensed my

deep interest in and admiration for Lincoln or whether he thought he saw a chance to plant the gospel in *partibus infidelium*. In any event we had a glorious day, and when my train pulled out I found that I was a member of The Abraham Lincoln Association.

That was the last time I ever saw Logan, but I have always been grateful for a memorable experience; and, whenever I receive one of these volumes,¹ I vividly recall him saying goodbye—his tolerant smile seeming to forgive the ancient heresies of his most recent convert.

So from doing this review perhaps I should have recused myself. However, I am not sure that an entirely impartial reviewer could have been found, for it is an axiom among publishers that books about Lincoln are always sure-fire. Moreover, the merits of the case are obvious.

Dr. Baringer has written an admirable account of the difficult period between Lincoln's election and inauguration.² It is an enthralling picture of Lincoln between two worlds—one dead, the other struggling to be born. We see him day after day in Springfield, harassed by hordes of office-seekers. Handicapped in his efforts to form a cabinet by the convention bargains his managers had made, we hear him exclaim in disgust, "They have gambled me

1. The Abraham Lincoln Association has published nine volumes of Addresses (1909-1918), sixteen volumes of Papers (1924-1939), fifty-eight Bulletins (1923-1939), more than two Volumes of *The Abraham Lincoln Quarterly* (1940-1945), and the following monographs:

Benjamin P. Thomas, *Lincoln's "New Salem"*

Paul M. Angle, "*Here I Have Lived*"; *A History of Lincoln's Springfield*

W. D. Howells, *Life of Abraham Lincoln* (Facsimile reprint of a copy corrected by A. Lincoln, candidate for President.)

Harry E. Pratt, *Lincoln: 1809-1839*

Harry E. Pratt, *Lincoln: 1840-1846*

Benjamin P. Thomas, *Lincoln: 1847-1853*

Paul M. Angle, *Lincoln: 1854-1861*

Harry E. Pratt, *The Personal Finances of Abraham Lincoln*

Harry E. Pratt (Ed.), *Concerning Mr. Lincoln, In which Abraham Lincoln is Pictured as he Appeared to Letter Writers of his Time.*

The Association is a non-profit corporation devoted to the discovery, preservation, and dissemination of authentic information on all phases of the life of Abraham Lincoln.

2. From November 6, 1860, to March 5, 1861.

all around, bought and sold me a hundred times." We witness the maneuverings of the unsavory Cameron in his efforts to obtain a Cabinet portfolio. From behind the scenes we watch Lincoln as he neatly foils Seward's efforts to obtain immediate domination and to exclude Chase. We are there when the realization comes that, although the fate of the nation is the stake, there is no way that an incumbent of high office can successfully play the game save by playing politics. While in the background the approaching storm ominously gathers, the powerless president-elect attempts to compose his inaugural. At intervals, to escape his wife's humiliating vagaries and aberrations, he strolls among familiar scenes and chats with old friends. One Sunday afternoon he sits with Herndon in their untidy little office and they reminisce, as lawyers will, of amusing incidents in their practice. He tells his partner to let the Lincoln and Herndon sign still swing on its rusty mounting at the foot of the stairs, adding: "The election of a President makes no change in the firm of Lincoln and Herndon. If I live I'm coming back some time, and then we'll go right on practicing law as if nothing had ever happened." We hear him, depressed by the premonition that he will never return, bid a solemn farewell to his neighbors. We go with him on his circuitous and exhausting journey to Washington. We are at Harrisburg when, having unwisely yielded to the persuasions of Seward and Allan Pinkerton, he begins the last lap of his trip secretly and at night, that he may pass through Baltimore unknown and unnoticed.

Dr. Baringer has written history and drama—unembellished and authentic. His study is completely documented and entirely based on original sources—contemporary newspapers,³ memoirs published and unpublished and many private letters.

About biography as to all else, *de gustibus non est disputandum*. Some prefer it novelized—the kind of thing that Irving Stone did so well when he made Jessie Benton Fremont

the central character in "The Immortal Wife"; others deplore the inaccuracies, both inadvertent and deliberate, of this method. Many like the way W. E. Woodward streamlines his stories and resurrects his subjects: serious readers regret his brevity and his failure to cite sources. Lytton Strachey, by the thoroughness of his research and the brilliancy of his style, captivated a multitude of admirers: the critical deplored the looseness of rein with which he rode his imagination when seeking to discover unvoiced thoughts and unrecorded conversations. There may even have been those who enjoyed the dreary tomes with which Victorian widows once caused to be memorialized the minor celebrities who had been their spouses. Most, however, found in them the only valid argument that could be advanced in favor of suttee.

Dr. Baringer belongs to none of these schools. His method gives us what approaches Judge Parker's ideal of a perfect record. Although all irrelevancies are excluded nothing material is omitted; authorities are cited for every positive statement; when conclusions are drawn or conjectures made they are clearly earmarked and based upon known facts; there is no attempt at psychoanalysis or fine writing; the style is felicitous and simple.

Most men who are accustomed to weighing testimony enjoy forming their own opinions as to what it proves. This always is a stimulating intellectual exercise — fascinating when the evidence relates to a great but puzzling historic personage seen against the backdrop of a critical period. And so I cannot presently think of any lawyer who would not derive both pleasure and profit from reading this volume.

WALTER P. ARMSTRONG
Memphis,* Tenn.

3. The most valuable newspaper source is the dispatches of Henry Villard which appeared in the New York *Herald* under a Springfield date line. Villard, who was a personal friend, was with Lincoln during this entire period. A native of Bavaria, he emigrated to the United States after the revolution of 1848. Quickly mastering the English language he became a notable journalist. He reported the Lincoln-Douglas de-

WORLD POLICING AND THE CONSTITUTION. By James Grafton Rogers. Boston: World Peace Foundation. May, 1945. Pages 123. 25 cents (paper-covered).

This is No. 11 in the pamphlet series on "America Looks Ahead." The author is the scholarly James Grafton Rogers, former Assistant Secretary of State of the United States, —formerly a member of the Board of Editors of the *JOURNAL*. He has developed a compact and informative study of the powers of the President and the Congress, as exemplified during nine wars and a hundred military operations (1789-1945). He goes historically to the heart of the questions which arose as soon as the Charter of the United Nations was ratified by the Senate and the powers to be given to the American representative in the Security Council, as well as the manner of selecting and instructing him, became active issues. Mr. Rogers' inquiry into the precedents is unbiased and painstaking; his personal conclusions are that the framers of the Constitution intended broad powers for the President as to foreign affairs, subject to some definitive checks through the powers of the two houses of the Congress which "have exercised them little." The pamphlet is a worthwhile contribution to current discussions.

RECENT PUBLICATIONS

SYSTEMATIC POLITICS. By Charles E. Merriam. 1945. Pages xiii, 349. University of Chicago Press. Price, \$3.75.
GENERAL THEORY OF LAW AND STATE. By Hans Kelsen. 1945. Harvard Univ. Press. Pages xxxiii, 516. Price, \$6.
WILLIAM HOWARD TAFT, Yale Professor of Law and New Haven Citizen. By Frederick C. Hicks. 1945. Yale University Press. Pages xiv, 158. Price \$2.50.

bates, the convention that nominated Lincoln and the ensuing campaign. He was a field correspondent during the War Between the States. In later life Villard was a successful railroad promoter and financier. In 1881 he acquired a controlling interest in the New York *Evening Post* and, abdicating control of its policy, placed Horace White, E. L. Godkin and Carl Schurz in control of the editorial department.

Practising lawyer's guide to the current LAW MAGAZINES

ADMINISTRATIVE LAW—*The McCarron-Summers Bill*—"Administrative Agencies and the Law": A contribution under the above-quoted title is in the Spring issue of the *Women Lawyers Journal* (Vol. XXXI—No. 2; pages 6-8, 25-26). The author is Roscoe Pound, the beloved Dean Emeritus of the Harvard Law School. It is a reasoned and forthright exposition of the earnest views which he has voiced unceasingly, from patriotic concern for the future of law, free institutions, and the dignity and rights of the individual man. He inveighs against the persistent preachment of "a society in which an omniscient and benevolent government will provide for the satisfaction of the material wants of everyone and there will be no need of adjusting relations or ordering conduct by law since everyone will be satisfied. Thus there will be no rights. There will be only a general duty of passive obedience." In his closing sentence, Dean Pound warns again that "We need to be vigilant that while we are combatting regimes of this sort, as they have developed in dictatorships and totalitarian governments, we do not allow a regime of autocratic bureaus to become so entrenched at home as to lead us in the same direction." (Address: *Women Lawyers Journal*, 1956 Buhl Bldg., Detroit 26, Mich.; price for a single copy: 25 cents).

AVIATION LAW—*Torts*—"Res Ipsa Loquitur and Standards of Conduct in Private Aviation": The May issue of the *Iowa Law Review* (Vol. 30—No. 4, pages 550-563) contains the third and final installment of a comprehensive and well-reasoned note on the tort liability of private oper-

ators of aircraft. Preceding installments were in the January and March issues (Nos. 2 and 3). In view of the probable rapid expansion of private operation of aircraft in the postwar period and the revelation, through the disaster at the Empire State Building on July 28, of the extent of the damage which an airplane mishap may inflict on persons and property in a modern city, this note makes available a research-saving exploration into one of the newer and fast-developing fields of law. Any lawyer may be glad to have it in his reference files. (Address: *Iowa Law Review*, Iowa City, Iowa; price for a single copy of this issue: \$1.50; for the three issues, \$4.50).

CONSTITUTIONAL LAW—*Anti-Trust Suit by a State*—"Two Effects of the Decision in *Georgia v. Pennsylvania Railroad*": A useful note in the June issue of the *University of Pennsylvania Law Review* (Vol. 93—No. 4; pages 442-454) discusses two important effects of the decision of the Supreme Court in *Georgia v. Pennsylvania Railroad, et al.* (324 U. S.

). The note points out that the majority in the present Court sustained, contrary to its prior decisions, the right of a state to bring an original suit in the Supreme Court, under Article III, Section 2, of the Constitution, as *parens patriae* on behalf

of her citizens, to enforce an alleged claim with respect to a right created by a federal statute. It is also observed that the majority decision, by permitting the State of Georgia to by-pass the Interstate Commerce Commission and to bring before a court an anti-trust suit involving allegedly unlawful rates, not only limits the operation of Section 16 of the Clayton Act but also represents a departure from the settled principle that prior resort should be made to the Interstate Commerce Commission in such cases in order to insure the preservation of a unified system of rate regulation. (Address: *University of Pennsylvania Law Review*, Thirty-fourth and Chestnut Streets, Philadelphia 4, Pa.; price for a single copy: 75 cents).

CONSTITUTIONAL LAW—*Taxation*—"The Waiving of Intergovernmental Tax Immunities": The leading article in the May issue of the *Harvard Law Review* (Vol. LVIII No. 5; pages 633-674) is the first of two studies by Professor Thomas Reed Powell of the Harvard Law School on the series of decisions of the Supreme Court of the United States as to the authority of the federal government to tax instrumentalities of state governments and *vice versa*. The author justifies the above-quoted title of his first article by a close analysis of rulings which during the past fifteen years, have upheld federal taxes imposed on various agencies and persons connected with state governments. These, he concludes, have substantially reduced the "bulge" of intergovernmental tax immunity which earlier decisions had created. Professor Powell finds, however, that after 1912 there was "a slowing down

Editor's Note

Members of the Association who wish to obtain any article referred to should make a prompt request to the address given with remittance of the price stated. If copies are unobtainable from the publisher, the JOURNAL will endeavor to supply, at a price to cover the cost plus handling and postage, a planograph or other copy of a current article.

of the process of eroding once firmly established constitutional immunities." The remnant of these immunities he proposes to examine in a sequel to the present article. (Address: The Harvard Law Review, Gannett House, Cambridge, Mass.; price for single copy: 75 cents.)

CORPORATIONS — "*Adjudication of Intercorporate Claims Under The Public Utility Holding Company Act*"—A note in the March issue of *The Yale Law Journal* (Vol. 54—No. 2; pages 445-451) considers a recent decision by the New York State Courts, which dismissed a derivative suit based upon the alleged failure of the directors of a corporation to sue other companies in the same holding-company system on claims arising out of stock transfers consummated by a prior management. The Court found that the directors had the right, in lieu of bringing an action upon the claims, to pursue the alternative course of submitting to the Securities and Exchange Commission, pursuant to Section 11 (c) of the Public Utility Holding Company Act of 1935, a plan of recapitalization which called for settlement of the claims. The note states that the case provides a new theory, applicable to derivative actions, in support of the primary jurisdiction of the Securities and Exchange Commission over intra-system claims. This is deemed to be less vulnerable than either the Commission's original theory of exclusive jurisdiction or the argument that the Commission's proceedings are an adequate remedy at law. The new theory does not leave the scope of the Commission's authority subject to judicial discretion as under the concurrent jurisdiction rationale. While conceding that certain facts in the case discussed, which made litigation particularly inadvisable, might not be present in other cases, the author states that the submission of a voluntary plan of recapitalization to the Commission, with provision for the settlement of intra-system claims, seems in any event a reasonable alternative to litigation, amounting to

an out-of-court settlement. (Address: The Yale Law Journal, 401A Yale Station, New Haven, Conn.; price for a single copy, \$1.25.)

DOMESTIC RELATIONS—Marriage and Divorce—Conflict of Laws—"Out-Haddock Haddock": Professor Edwin S. Corwin of Princeton University contributes an interesting commentary in the June issue of the *University of Pennsylvania Law Review* (Vol. 93—No. 4; pages 341-356), on the decisions of the Supreme Court in *Williams v. North Carolina*. Professor Corwin maintains that the result in *Williams II* "climaxed a long course of unwarranted assumption of power by the Court—a course of decision which has gradually eroded the 'full faith and credit' clause and the implementing acts of Congress". He suggests four steps to avoid a recurrence of like litigation and result: The dismissal of the concept of "domicile" from divorce cases, the recognition by the Supreme Court that divorce proceedings are *in personam*; the enforcement of the "due process of law" requirement in all divorce cases by requiring personal service on the defendant, and the "abandonment by Congress of the irrational assumption that the broad term 'judicial proceedings' of the 'full faith and credit' clause refers only to final judgments", and the "enactment by it of a law providing for the service and execution throughout the United States of the judicial processes of the several states". (Address: University of Pennsylvania Law Review, Thirty-fourth and Chestnut Streets, Philadelphia 4, Pa.; price for a single copy: 75 cents.)

INTERNATIONAL LAW — *Administrative Law—"A Symposium in International Administrative Agencies"*: Anticipating brilliantly some of the juristic problems of the future, especially in view of the now prospective taking effect of the United Nations Charter and the setting up of numerous administrative agencies under the Economic and Social

Council and otherwise, the editors of the *Iowa Law Review* devoted their May issue to a symposium under the above-quoted title. Although the contents do not bite deeply into controversial angles which are ahead, an excellent exploratory view is given, both as to the experience had and the pitfalls revealed. Arthur Sweetser writes of "The World's Civil Service"; the clear-sighted Robert J. Watt, of the American Federation of Labor, pleads for democracy, warns against the inroads of labor organizations allied to undemocratic governments, and applauds the independent course of the ILO; the experienced George A. Finch, of the Carnegie Endowment, counsels as to "Training Personnel for International Administrative Work." A half-dozen other contributors add to the significance of the compilation, but leave room for wonder whether they contemplate a "super-national law" to take the place of or supplement "international law". Edgar Mowrer boldly enters provocative ground with his thesis that "So long as there are great powers owning allegiance to nothing above themselves there can be no lasting peace." His solution is their accountability to law. "How can any sane man hesitate", he asks, "especially when, by willingness to fight for law, we might well not have to fight at all?" But the experience of other countries, as well as our own, points strongly that the ascendancy of administrative agencies immune from plenary review by an impartial judicial tribunal does not establish or assure the rule of law. This symposium was planned and written before the Charter of the United Nations took on its comprehensive form and scope, and a great deal more could be said on many of the subjects now. The present compilation leaves no doubt, however, that American lawyers are likely to be faced with a new set of problems, as to administrative agencies in the international sphere, before we have succeeded in coping with the problems created by the sprawling bureaucracy within our own

country. (Address: Iowa Law Review, Iowa City, Iowa; price for a single copy: \$1.50).

INTERNATIONAL LAW—*"Universality of Jurisdiction Over War Crimes"*: In the June issue of the *California Law Review* (Vol. XXXIII—No. 2; pages 177-218), Lieut.-Col. W. B. Cowles, J. A. G. D., gives a most readable analysis of the historical precedents, and advocates ably his considered views, on the above-quoted subject. His principal conclusion is that "In the light of practice, and the basic principle and tests enunciated by the Permanent Court of International Justice in the *Lotus* case, it is clear that, under international law, every independent State has jurisdiction to punish war criminals in its custody regardless of the nationality of the victim, the time it entered the war, or the place where the offense was committed." (Address: California Law Review, University of California, Berkeley 3, Calif.; price for a single copy: 90 cents).

LEGISLATION—*Review of New Laws Enacted in New York During 1945*: The *New York State Bar Association Bulletin* follows its custom by devoting its June issue principally to authoritative summaries of new statutes enacted at the 1945 session of the New York State Legislature. Changes in laws affecting banks, insurance companies and stock corporations, and amendments to inheritance laws, tax laws and the Civil Practice Act, are digested in separate articles. The publication provides a convenient collection of significant statutory amendments in a form which should be helpful to lawyers of other states who may wish to follow trends in New York legislation. Each digest is written by a state official who deals with the particular statutes in question or by a member of the New York Bar who specializes in the field that is surveyed. Special note may be given to the article on "Inheritance Law Changes" by Surrogate James A. Foley, that on "Insurance Legislation," by Robert E.

Dincen, New York State Superintendent of Insurance, and that on "New Laws Affecting Banking Organizations" by William Mertens, Jr., Deputy Superintendent and Counsel of the New York State Banking Department. (Address: New York State Bar Association Bulletin, 90 State Street, Albany 7, N. Y.; the price for a copy is not stated.)

SALES—*"Resolving Ambiguities Against the Conditional Sale"*: The basis on which the courts of the State of Washington construe conditional sales agreements as chattel mortgages is the subject of an inquiry by Lucile Lomen in the April issue of the *Washington Law Review and State Bar Journal* (Vol. XX—No. 2; pages 112-121). She has been clerk for Associate Justice William O. Douglas of the Supreme Court of the United States during the October, 1944, term. Where the rights of third parties are involved, she concludes that there is a pronounced tendency to find a chattel mortgage, especially where the security transaction involved is not founded upon a *bona fide* sale or where the remedies reserved resemble more closely the cumulative remedies of a mortgage rather than the mutually exclusive remedies of a conditional sale. Her comment covers also a number of the possible pitfalls to the unwary draftsman of a conditional sales agreement. (Address: Washington Law Review, University of Washington Law School, Seattle, Wash.; price for a single copy: 50 cents).

TAXATION—*Income Taxes—'Securities' and 'Continuity of Interest'*: One of the troublesome questions arising under the reorganization sections of the federal income tax laws relates to the construction of "securities" received in an exchange made under a plan of reorganization, as to which no gain or loss for income tax purposes is to be recognized. Professor Erwin N. Griswold of the Harvard Law School, in an article in the May issue of *Harvard Law Review* (Vol. LVIII—No. 5; pages 705-725) re-examines the

decisions of the Supreme Court of the United States which have held that notes received or surrendered under a plan of reorganization are not "stocks or securities" of such a nature as to render the transaction tax exempt. With a careful analysis of the reasoning of these cases, the author concludes that the statute has been denied effect in a situation to which it clearly should apply, and that noteholders and other creditors participating in a reorganization should be accorded the same status for tax purposes as that given to bondholders and stockholders. (Address: Harvard Law Review, Gannett House, Cambridge, Mass.; price for a single copy: 75 cents.)

TORTS—*Recovery Where Plaintiff Knowingly Incurred Danger*: An interesting examination of English decisions on the right of a person to recover for injuries received in a situation in which he knowingly incurred danger is published in the April issue of *The Law Quarterly Review* (Volume 61; pages 140-160.) The author, D. M. Gordon, who entitles his article "Wrong Turns in the Volens Cases," writes from the point of view of a practicing lawyer who is perplexed by the confusion and inconsistencies of the English case law on the subject. He says "The writer's attention was first particularly drawn to the conflict between the decisions when he found himself unable to advise a client on the following facts: The client had been hired to pick apples. He was taken to an orchard, shown a row of trees, told he was expected to gather every apple, and shown ladders that he might use if he chose. One tree was too high for any ladder to reach the top. He put the ladders aside and climbed the tree; a limb broke; he fell and was injured." The author's extensive study leads him to the conclusion that the English decisions have reached a point where no one can predict the outcome of a case in which danger was knowingly incurred, unless the facts are indistinguishable from those of some authoritative decision. (Address: The

Law Quarterly Review, The Carswell Co. Ltd., Toronto, Canada; price for a single copy: \$1.75.)

TRADE AND COMMERCE—Unfair Competition—"Recent Trends In Trade Disparagement Doctrines in Relation to Unfair Competition": This editorial note, in the June issue of the *George Washington Law Review* (Vol. 13—No. 4; pages 468-488) discusses how far courts should go in protecting the honest trader from the disparagement of his goods and other foreseeable wrongs, at the hands of competitors or non-competitors. The note suggests that a court should not

be deterred from granting relief in the field of commercial relationships merely because of the absence of malice, special damages, competition in the ordinary sense, or the lack of threats, coercion or intimidation, and that the tendency now under way to extend the law of unfair competition to include all clashes in the commercial world, whether generically competitive or not, should continue. (Address: *George Washington Law Review*, George Washington University, Washington, D. C.; price for a single copy: \$1.00).

TRIALS—"Standardized Instructions to Juries Adopted by the Association of District Judges of Nebraska": Useful to members of the Nebraska Bar and interesting to others is the publication, in the June issue of the *Nebraska Law Review* (Vol. 24—No. 2; pages 195-224), of the first fifty standardized instructions to juries, for use in as many types of litigated matters, to be adopted by the Association of District Judges in Nebraska. Criticism of these instructions is invited, and all members of the Nebraska Bar are urged to cooperate to the end that this work may be enlarged and perfected. (Address: University of Nebraska, College of Law, Lincoln 1, Neb.; price for a single copy: 25 cents).

Professional Ethics Committee

OPINION No. 264

(June 21, 1945)

ADVERTISING, DIRECT OR INDIRECT—Announcement cards by lawyers returning from Government service. While it is proper for lawyers returning from Government service to send notices thereof to members of the bar and to former clients, in order so to advise of their return, it is unnecessary to state the legal position occupied, and the emphasis thereof in cards frequently used constitutes improper advertising.

Canon involved 27

By the Committee: Messrs. Brand, Drinker, Hostetler, Houghton, Jackson, Powell and Shackelford concurring.

The Committee's attention has recently been called on a number of occasions, by various organizations and members of the bar, to the cards which, in recent months, have been sent out by law firms and individual lawyers to members of the bar and, perhaps, to others, announcing the return to practice of a partner or associate who has been absent on Gov-

ernment service. Very frequently such cards state that the attorney in question has been acting as a legal adviser to or in a specified Government agency, or has been a member of the staff of such agency; or that he will specialize in certain branches of the law.

Examples of such cards are:

— Broadway
New York
A B

Having resigned as an Associate Public Member of the National War Labor Board announces that he has resumed the practice of the law at the above address where he will specialize in trademark, anti-trust and labor law.

— 1945 Whitehall —

A B C

Announces his resignation as Conferee-Reviewer, Salary Stabilization Unit Internal Revenue Service, U. S. Treasury Department to resume practice of law in association with

D and D
Philadelphia
Rittenhouse —

— Wall Street
New York 5

Mr. A B C, formerly associated with

the National Labor Relations Board as trial attorney in its field offices, and as litigation attorney and an administrative officer in its Washington offices, and more recently with the Curtiss-Wright Corporation as industrial relations attorney for the airplane division, has become associated with our firm.

D E F & G

January 1, 1945

A B C, Jr.

Associate counsel to the New York State Liquor Authority until January First, 1945, has resumed the practice of law, specializing in matters relating to the alcoholic beverage industries.

— West —th Street
L Ongacre — New York —, N. Y.

20 — — — Place
New York —, N. Y.

A B has today joined this firm as a partner and will continue to specialize in tax matters.

C D E & F
July 1, 1945 Whitehall —

— Street
New York 4, N. Y.

Hanover —

A B and C D announce the formation of a partnership for the general practice of the law.

A B was formerly a special assistant to the Attorney General and chief of the New York office of the Antitrust Division of the Department of Justice.

C D was formerly regional attorney for the United States Department of Labor.

☆☆☆

B and D

June 1, 1945

Inquiry has been made as to the propriety of such announcements.

This Committee has ruled that it is entirely proper, when a member of or an associate of a law firm returns to practice from military or other Government service, that an announcement be sent out by him or by his firm to clients and members of the bar, stating that he has returned to practice. The Committee, however, can see no reason for adding to such a simple announcement the fact that the attorney has been employed by a specified Government department, other than to emphasize his special familiarity with the problems of that particular Government department and his acquaintance with the personnel therein, the conclusion being that he is unusually well fitted to undertake professional work involving such Government agency.

In opinion 251 this Committee held that cards announcing the opening or removal of a law office may not properly contain statements to the effect that a lawyer intends to specialize in certain types of work or before certain tribunals (see also opinions 175, 194 and 228 discussed therein). The implication of the announcement in question would appear to be that the lawyer was peculiarly qualified in the branch of the law in which he had been recently engaged.

While in many cases the addition to the simple announcement of the particulars of the attorney's employment is doubtless prompted simply by the natural pride of his associates in his public service, nevertheless, the necessary effect of such statements in the opinion of the Committee constitutes advertising, prohibited by Canon 27.

OPINION No. 265 (June 21, 1945)

DIVISION OF FEES—"FORWARDER'S FEE"—A lawyer engaging another lawyer to perform services for his client is not ipso facto entitled to a share of the latter's fee.

Canon involved: 34

Opinions referred to: 18, 27, 28, 63, 153, 170, 190, 204

The opinion was stated by Mr. Drinker, Messrs. Brand, Hostetler, Houghton, Jackson, Powell and Shackleford concurring.

A, a member of the Association, advised us that at the instance of one of his clients, who was indicted in the Federal Court in a distant city, he called up B, a member of the bar in that city, whose name he got from a list of bank attorneys, and asked him to represent his client in the court proceedings. Nothing whatever was said in this telephone interview about any division of fees. B interviewed the client and prepared the case for trial.

During the course of the preparation of the trial A took some depositions and also had some other minor participation in the preparation of the case, but such service was not of an importance to warrant the participation on a substantial percentage basis by A with B in the considerable fee earned and payable for the actual conduct of the case.

After the conclusion of the case B asked through A for the balance of his fee in a substantial sum and A secured a check for such amount from the client and forwarded it to B, with a letter stating that he expected B to remit to him 1/3 of the total fee earned, this being the usual forwarding fee. Lawyer B replied that the compensation fixed by him had been for his own services only, with no suggestion by A or thought on B's part of a division with A, and declined to recognize the right of A to a division of the fee. Lawyer A, believing that under the general custom a forwarding attorney is entitled as of right to 1/3d of the fee ultimately earned, irrespective of the work or responsibility actually assumed, appealed to this committee on the ground that the refusal by B to recognize A's claim was a violation of the ethics of the profession.

Canon 34 provides as follows:

"No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility."

An attorney who recommends an attorney in another jurisdiction to his client, or who, at the client's in-

stance, retains such attorney to represent the client, is not thereby ipso facto entitled to any "customary" division of the fees earned by the latter.

As we said in opinion No. 204, an attorney engaging for his client the services of a lawyer in another jurisdiction, with whom the client thereafter is to have and actually has direct dealings, should in every case, if he expects the lawyer whom he retains to share the ultimate fee with him, either on a percentage basis or other basis, which must accord with Canon 34, come to an understanding with his correspondent at the outset. Where he does not do so, the second lawyer is warranted in assuming that he will be compensated directly by the client for whatever responsibility or service he assumes or renders.

See also opinions 18, 27, 28, 63, 153, 171 and 190.

OPINION No. 266 (June 21, 1945)

DIVISION OF FEES—CONFIDENTIAL INFORMATION—SOLICITATION—

The purchase of the practice and goodwill of a deceased lawyer by another lawyer not his partner and the payment therefor to his estate measured by a percentage of the fees, gross or net, subsequently paid by his former clients violates Canon 34 and may violate Canons 37 and 27.

Canons involved: 34, 37, 27

A law firm has asked the opinion of the Committee as to the ethical propriety of the purchase from the heirs or personal representatives of a deceased lawyer who had no partner, of his good will and practice, whether by payment of a lump sum or by an agreement to pay a stated percentage of the future receipts, gross or net, from his clients.

The opinion was stated by the Committee, Messrs. Brand, Drinker, Hostetler, Houghton, Jackson, Powell and Shackleford concurring.

Canon 34, entitled "Division of Fees" provides:

"No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility."

This provision prohibits an

agreement for the payment to the widow and heirs of the deceased lawyer of a percentage, either gross or net, of the fees received from the future business of the deceased lawyer's clients, both because the recipients of such division are not lawyers, and because such payments will not represent service or responsibility on the part of the recipient. The latter consideration would also preclude the purchase by one lawyer of the practice of another who has retired, on the basis of a percentage of future receipts based on future services.

The deceased lawyer has, however, a claim against his clients for the agreed or fair value of whatever services he may have performed for them up to the time of his death. His estate also owns his library, furniture, fixtures and the unexpired term and any renewal privilege on the lease of his office. These assets another lawyer may properly purchase from his estate at a reasonable agreed amount, payable either in a lump sum or in instalments.

Since, under Canon 12, one of the items entitled to consideration in fixing a fee is the "benefits resulting to the client from the services," the amount to which the estate of a deceased lawyer may be entitled from clients for services *already* performed may not be determinable until the final settlement of the matter in question. Any attorney who takes over an unfinished case may properly, when the entire service is paid for by the client, pay to the widow or heirs of the deceased attorney, a proportion of the total compensation fairly representing the proportion of the service rendered by the deceased attorney up to the time of his death.

The good will of the practice of a lawyer is not, however, of itself an asset, which either he or his estate can sell. As said by the Committee on Professional Ethics of the New York County Lawyers' Association in its Opinion No. 109 (October 6, 1943):

"Clients are not merchandise. Lawyers are not tradesmen. They have nothing to sell but personal service. An attempt, therefore, to barter in clients,

would appear to be inconsistent with the best concepts of our professional status."

Two other Canons further bear on the suggested arrangement. Canon 37 provides:

"It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment . . ."

Every lawyer's files contain confidential information from clients which neither he nor his heirs or personal representatives may properly disclose without the client's express permission.

Canon 27, prohibiting solicitation, obviously precludes a lawyer, who has purchased the practice of a deceased lawyer, from soliciting by arrangement with the estate of a deceased lawyer the latter's clients to continue their business with him, or from permitting the widow or heirs of the deceased to urge such clients to continue their business with him. The inevitable result of allowing such a transaction would be to give a preferred position to the highest obtainable bidder for the deceased's practice, which is not the basis on which an attorney should be retained.

It is, of course, to the interest of his clients that a lawyer practicing without partners or associates should see to it that in the event of his illness or death his clients should be at no avoidable disadvantage in connection with their pending matters. To this end, such a lawyer may properly arrange with another competent lawyer or firm to do what is necessary to protect the immediate interests of his clients in such an emergency. In any such case, however, the client always has the option to substitute another attorney of his choice.

It is entirely proper for the professional colleagues of a deceased lawyer, out of regard for him, and with the approval of the widow or personal representatives, to take such steps as are necessary to protect the immediate interests of his clients and to advise such clients that they are doing so, making it clear to the clients that the papers of the latter will be turned over promptly to any other attorney whom the client may desire to designate.

OPINION No. 267

(June 21, 1945)

PARTNERSHIP NAME—CONTINUED

USE BY A SURVIVOR. The continued use by a surviving partner of a firm name which includes the names of deceased partners is not unethical, if permitted by local custom and if no imposition or deception is practiced through this use.

Canon involved: 33

Opinions 6, 208, 219, 258

The Board of Governors of a state bar association has submitted to this Committee the question of ethics hereinafter stated with the request for an opinion.

The question is as follows:

In 1925 a law partnership was formed under the firm name of A B C & D. In 1929 B passed away, C died in 1930, and A in 1935. D did not acquire another partner nor did he change the firm name of A B C & D.

The son of C started the practice of law in 1933, and the paternal grandson of B started practice in 1943; they both practiced in the same city in which the firm of A B C & D was engaged in practicing law. Asserting that they found themselves in competition with their own names they sought to induce D to abandon the use of the names C and B in his firm name. Excepting for these two, D has continued to practice under the firm name without objection from other heirs. D refused to comply and contends that Canon 33 sanctions his conduct.

Nothing in the partnership agreement specifically gave D the right to continue the firm name.

The son of C has the identical given and middle name as his deceased father. In 1934, C, Jr., entered into partnership with another attorney, and in 1937 a third attorney became a member of the firm and C, Jr., is now a partner in the firm of X, C, and Y.

In 1944, the grandson of B associated with a prominent law firm, but his name does not appear in the firm name.

The opinion of the committee was stated by Mr. Jackson, Messrs. Drinker, Hostetler, Houghton, Powell and Shackleford concurring.

Canon 33 provides, insofar as is presently material, as follows:

"In the formation of partnerships and the use of partnership names care should be taken not to violate any law, custom, or rule of court locally applicable. . . . In the selection and use of a firm name, no false, misleading, assumed or trade name should be

used. The continued use of the name of a deceased or former partner, when permissible by local custom, is not unethical, but care should be taken that no imposition or deception is practiced through this use."

Prior to the adoption of Canon 33, substantially the same question as is now presented was discussed at length in one of the earliest of this Committee's opinions (Opinion 6), where the Committee, approving the continued use of a partnership name by surviving and succeeding partners, said:

The question is raised whether the continued use of the firm name by a surviving partner, irrespective of any intent to deceive, is of itself contrary to the ethics of the legal profession.

The practice of continuing to use a firm name after one or all of the original partners are dead or have ceased to be members of the firm has prevailed in New York and in other jurisdictions for many years. The same provisions of law as to the use of such names prevail in the case of legal firms as in the case of firms generally, and there is no ground for believing that the propriety of this practice has, in the long course of years in which it has prevailed, been seriously called in question. The fact undoubtedly is that the use of partnership names by surviving and succeeding partners is not intended to mislead anyone as to the personnel of the firm, ought not to mislead anyone and does not mislead anyone. The firm name does not, in view of the long-established practice and usage, create any presumption that the former partners whose names appear in the firm title are still active members of the firm, but merely indicates that the firm is a continuation of the firm in which they were once partners. Of course, in most cases, the partner's surname alone is used in the firm name. If the continued use of the firm name carried the implication that a partner having such a surname was still a member (which, however, according to custom and practice it does not), there would still be no implication that the partner having such surname was the original partner. If the continued use of the name is to be regarded as unethical because misleading, the continued use of the name would be just as misleading and therefore just as unethical if in place of the deceased partner there were another partner having the same surname. It is certain, however, that the use of the firm name "Jones, Smith & Robinson" would not be regarded as misleading or unethical because the

"Smith" of the present firm is a different man from the "Smith" who was the original partner. Equally, the continued use of the name would not be misleading or unethical where the original "Smith" is dead and his successor bears a different name or there is no successor. Custom, usage and the statutory provisions all recognize that a firm name in the case of a law firm as well as in the case of any other firm does not identify the individual members of the firm.

The necessary conclusion is that the continued use of a firm name by a surviving partner is not in and of itself unethical . . .

The necessary corollary to the conclusions that have been stated is that, if in a local community there is a custom whereby a firm name serves to identify the individual members of the firm, so that the use of the firm name amounts to a representation that certain individuals are members of the firm, the continued use of the firm name might be misleading and the local custom should be observed.

In Opinion 208 inquiry was made as to whether a law firm may show the names of deceased former members on the firm letterhead as members or otherwise, and it was held that, while the names of former members of a law firm should not be used in any manner that would be misleading or deceptive, it was not uncommon to show that a former member was deceased or had retired from the practice by indicating after his name the date he became and the date he ceased to be a member of the firm. This practice was approved.

In Opinion 219, after referring to Opinions 6, 97 and 192, the Committee said:

It is entirely clear from these opinions that, as a matter of ethics, the death of a partner need not be reflected by a change in the firm name, where the remaining partner or partners continue the practice, provided deception is avoided, as by giving the names of the partners on letterheads or listings.

* * *

The committee is not unmindful of the fact that many of the states have statutes requiring the filing and publication of a certificate setting out the names of individuals doing business under a firm or trade name and the conditions under which such a name may be continued in use upon the death of a member, nor of the fact that rules of procedure frequently require

the use on court papers of the name of counsel admitted to practice in that court. These statutes and rules serve a purpose similar to that of Canon 33 but are not in conflict with it.

We add only that where court rules forbid the use in the practice of the law of the name of a deceased partner, such rule must, of course, be observed. . . .

Opinion 258, dealing with the same Canon, held that where two surviving partners had dissolved the firm and each had gone out to practice on his own, the essential element of continuity was lost and that neither of the former partners could resort to or adopt the abandoned firm name or any other "assumed or trade name" (Canon 33).

The continued use of a firm name by one or more surviving partners after the death of a member of the firm whose name is in the firm title is expressly permitted by the Canons of Ethics. The reason for this is that all of the partners have by their joint and several efforts over a period of years contributed to the good will attached to the firm name. In the case of a firm having widespread connections, this good will is disturbed by a change in firm name every time a name partner dies, and that reflects a loss in some degree of the good will to the building up of which the surviving partners have contributed their time, skill and labor through a period of years. To avoid this loss the firm name is continued, and to meet the requirements of the Canon the individuals constituting the firm from time to time are listed.

On the basis of these reasons and of a practice approved by Canon 33 and by local custom, there appears to be no ground for the son of C or the grandson of B, in the case put to us, complaining because D is endeavoring to hold on to a good will which he and his former partners built up and to which the son of C and the grandson of B have made no contribution.

Mr. BRAND dissenting:

I do not think the Canon contemplates the continued use of a firm name by the sole surviving partner. Such use, except temporarily, would, in my opinion, be misleading.

OPINION No. 268

(June 21, 1945)

CONFIDENCES OF A CLIENT—A lawyer consulted by a nonresident as to a divorce who learned that the client had an insufficient bona fide residence may not properly tell this to the Court or to another lawyer later procured by the client to obtain such divorce.

Canons involved: 37, 29

A member of a Florida Court Commission has asked the American Bar Association for advice on the following facts:

"X" appears in the office of attorney "A" to consult "A" about procuring a divorce for him. After discussing the facts, "A" informs "X" that he has not resided in the state the time required by the statute before he can legally file such a suit. "X" then pays to "A" a consultation fee, leaves his office and goes to Attorney "B" where he makes a false statement about his residence to "B", which statement meets the statutory requirements, and "B" files the suit for "X". A few days thereafter, "A" learns of the filing of the suit by "B" for "X". Is "A", by any canon of ethics, relationship of attorney and client, or otherwise, prevented from telling the Court, "B" or anyone else, the facts related to him by "X" concerning "X's" residence? Would the answer be the same were no consultation fee paid?

The opinion of the Committee was stated by Mr. POWELL, Messrs. Brand, Drinker, Hostetler, Jackson, Houghton and Shackelford concurring.

Canon 37 of the Association, entitled "Confidences of a Client," provides, in part, "It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, . . ." Canon 29, entitled "Upholding the Honor of the Profession" provides, in part, "The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities."

The first of these provisions is designed to insure the client against disclosure by a lawyer of any information whatever given the lawyer by

the client in the course of professional consultation. This duty of preserving the client's confidences is not dependent on whether a consultation fee is paid. If the relation of attorney and client actually attaches, any statement made by the client to the attorney in reference to the matter, as to which he consults the lawyer, is privileged against disclosure by the lawyer, regardless of the payment of any fee.

While ordinarily it is the duty of a lawyer, as an officer of the court, to disclose to the court any fraud that he believes is being practiced on the court, this duty does not transcend that to preserve the client's confidences.

It is not infrequently the case that a lawyer who has been retained by a client accused of crime, having been told by the client facts which make it certain that the client is guilty, declines to represent the defendant, inasmuch as a successful defense cannot be hoped for without suborning perjury under such circumstances. In such case, the lawyer is bound by the Canon not to disclose the information received from the client in confidence, though he ascertains that the client, having subsequently retained another lawyer, has, in his defense, stated the facts to be otherwise.

OPINION No. 269

(June 21, 1945)

PARTNERSHIPS—DIVISION OF FEES—A partnership between a lawyer and a layman accountant to specialize in income tax work and related accounting is permissible only if the lawyer ceases entirely to hold himself out as such and confines his activities strictly to such as are open to lay accountants.

Canons involved: 33, 34, 35, 47
Opinion 257

The Committee is asked to express its opinion on the following questions:

A is an attorney at law and a certified public accountant. Can he be employed by an accounting firm which

specializes in income tax work performing such work which necessarily includes accounting and law work in the preparation of income tax returns and the presentation of cases before the U. S. Treasury Department? All income tax cases have mixed questions of accounting and law insofar as income taxes (law) are concerned. Can A be a member of an accounting firm as a partner?

B is an attorney at law, with knowledge of accounting. Can he be employed by an accounting firm of certified public accountants and perform the work outlined in the above question. Can such an attorney at law appear before the U. S. Tax Court representing a client of such certified public accountant assuming (a) he is not a certified public accountant (b) he is a certified public accountant and is admitted to practice before the Tax Court?

The opinion of the Committee was stated by Mr. JACKSON, Messrs. Brand, Drinker, Hostetler, Houghton, Powell and Shackelford concurring.

This Committee has no jurisdiction to deal with questions of law or unauthorized practice. Accordingly, our opinion is limited to the problems of ethics involved in the above questions.

In opinion 257 we held that a lawyer may enter into partnership with a lay patent agent licensed by the United States Patent Office if the partnership activities are limited to such as are permitted laymen under Patent Office rules. We said there:

We have held that certain activities constitute the practice of the law when engaged in by a lawyer despite the fact that those activities may lawfully be engaged in by one not a lawyer. A lawyer may properly enter into partnership with a layman if the activities of the partnership and of the lawyer member are confined to those which may be carried on by the layman, provided the lawyer renounces or refrains from holding himself out as a lawyer and from carrying on any activities which may not properly be carried on by the layman (see Opinion No. 239). Thus, if a lawyer goes into a partnership conducting an accounting or a collection business, he can no longer with propriety continue to hold himself out as a lawyer or continue to practice law. The accounting and

collection business are fields open to laymen, and this is so even if these activities involve necessarily a limited degree of legal knowledge.

We desire to emphasize that the lawyer in the instant case and in like lay partnerships must completely disassociate himself from any practice or holding out that would indicate that he is a member of the bar or in

any way engaged in practice as a lawyer. If, for example, he prepares a tax claim, his employer must understand that he is not acting as a member of the bar, but solely as an accountant. In our opinion Canon 33 does not apply to a member of the bar who restricts his activities as above indicated, but only to one who holds himself out as a lawyer and at

the same time engages in a type of activity open to laymen which serves as a natural feeder to his law practice.

With respect to listing in a law list we held in opinion 257 that an asterisk opposite the name of the lawyer member of such a partnership could not be used to indicate that he had been admitted to practice, and that we re-affirm.

Bar Association News



FREDERIC M. MILLER

Iowa State Bar Association

At the annual meeting of the Association held in Des Moines on June 2, 1945, the following officers, having received a majority of the votes cast, were declared duly elected as the officers of the Iowa State Bar Association for the year 1945-1946:

President, Frederic M. Miller, Des Moines; Vice President, Charles E. Hughes, Belle Plaine; Librarian, Bona B. Druker, Marshalltown; Secretary-Treasurer, John S. Howland, Des Moines.

The Pennsylvania Bar Association

The fiftieth anniversary meeting of the Pennsylvania Bar Association was held June 28 and 29, 1945, at the William Penn Hotel, Pittsburgh.

The Fiftieth Anniversary Committee of this Association reported that the Association has in mind the creation of a permanent memorial in commemoration of the 50th Anniversary of the Association, such as the purchase of a permanent home in which it could preserve its records, carry on its administrative work, conduct many of its committee meetings, and generally center its activities.

Notwithstanding the war conditions this voluntary bar association showed a net gain in membership during the current year, although 696 members are now serving in the armed forces.

The Committee on Legal Placement Service presented an interesting report regarding its activities and its endeavors to assist the returning veterans, who are also members of the Bar, to locate suitable employment, and to assist them in numerous ways to adjust themselves to civilian life upon their discharge from service.

A resolution was passed authorizing the president of the Association to appoint a Special Committee on the World Court to cooperate with



JOHN G. BUCHANAN

the American Bar Association Committee on Proposals for the organization of the nations for peace, justice and law.

John G. Buchanan, Esq., of Pittsburgh, was elected President and Edmund C. Wingerd, Esq., of Chambersburg, was elected Vice President. Col. John McL. Smith of Harrisburg, was re-elected Secretary; Fidelity-Philadelphia Trust Company of Philadelphia, was re-elected Treasurer, and Mrs. Barbara Lutz, 11 Market Street, Harrisburg, was re-elected Executive Secretary of the Association.

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PATENT LAW

(Continued from page 463)

When a farmer plants trees on idle land, useless for farming, he creates a tangible land value in excess of the original land value by his labor in planting and caring for the trees. When a workman machines a piece of steel to produce an airplane crankshaft or a sculptor chisels a piece of marble to produce a statue, labor has been converted into tangible chattel property values far in excess of the original value of the material employed. In each case, the one who has performed the labor, or if he was employed for that purpose, his employer who has paid for the labor expects to be protected in his right of ownership of the enhanced property value. If these rights were



CHASE HARDING

Indiana State Bar Association

At a meeting of the Board of Managers of the Indiana State Bar Association on July 14, the following officers were elected: Chase Harding, Crawfordsville, President; Charles A. Lowe, Lawrenceburg, Vice President; Charles M. Reed, East Chicago, Michael T. Ricks, Lafayette, Clyde W. Reed, Fort Wayne, George W. Pierce, Muncie, and John E. Early, Evansville, members of Board of Managers.

no longer respected, no one would work for himself, no one would employ another, there would be no employment for lawyers in defending or interpreting rights whether on behalf of so-called propertied interests, or on behalf of labor.

When an inventor conceives a new form of machine or manufacturing process, he invests both countless hours of his time as well as a fortune in dollars in order to make the seemingly endless tests and experiments which he hopes will finally yield success.

The example may seem extreme, however, the case of the invention of the "fluid catalyst" cracking process of making gasoline is of particular interest at this time as it made possible the production of the enormous



CHARLES L. GOWEN

Georgia Bar Association

At the last annual meeting of the Georgia Bar Association held on May 30 and 31, the following officers were elected for 1945-1946: Charles L. Gowen, Brunswick, President; Hugh M. Dorsey, Jr., Atlanta, Vice President; J. Wilson Parker, Atlanta, Treasurer, and R. Lanier Anderson, Jr., Macon, Secretary.

Among the speakers at this meeting were Hon. Ellis Arnall, Governor of Georgia, and Hon. R. C. Bell, Chief Justice of the Supreme Court of Georgia.

quantities of high octane required for our aerial armada. It is reported that by the time plans began to go on the drafting boards for the first commercial plant, a 13,000 barrel a day plant, catalytic cracking work of one of the major oil companies had added up to the continued endeavor over a two-year period of probably 400 individuals, and nearly a million dollars had been spent on pilot plants. By the time the first plants had been built, that company had put a total of five million man hours of research, development and engineering endeavor into this creation of the fluid catalyst process. That was the work of that one company, others were also at work on this problem, and the patents of all these companies were made available to the public.

Patents Encourage Inventions

No different from anyone else, the inventor or the one who risks employing him to invent, rightly expects to have a property right in his invention in exchange for his effort and his investment. The patent system is what makes it possible for the inventor to be rewarded. By its very nature, the amount of the reward is proportional to the value of the inventor's contribution to the public if the patent laws are fairly administered. The greater the acceptance of the invention by the public, the more extensive its use, the larger is the amount of royalties received by the inventor if licenses are granted under the patent or the greater the profits received if the patentee is the manufacturer. The grant of a patent to an inventor enables the inventor to convert his labor, his years of experimentation, into an asset which he can sell outright or let on a royalty basis. The possibility of obtaining a patent, also makes it possible for an employer to pay ingenious men salaries for experimenting and carrying on research because any inventions which may result can be converted into assets; assets of only seventeen years life to be sure, but nevertheless assets.

If this were not so, men with mechanical aptitude and creative instincts could not afford to devote themselves to making inventions

which improve the standard of living for society; no one could afford to employ them for this purpose; such men would be reduced to mere clerks.

Hostility to Patents Has Retarded Progress

It is no idle speculation to suppose that lessening the value of patents, a destructive attitude toward patents, will diminish an inventor's interest in invention, begin to dry up the source of ideas on which we depend for progress, in fact on which we as a nation will depend in the future for self-preservation as implements of war become more and more highly mechanized. From 1880 to 1930, through numerous vicissitudes in national life, wars, booms and depressions, the number of patents granted annually per hundred thousand population remained remarkably uniform. About 1930 there was a trend toward harsher rulings toward the patentee and the number of applications filed immediately fell off; about three years later this was reflected in a decline in the number of patents granted per thousand of population. Between 1933 and 1943 the patents granted fell off 41½%; between 1930 and 1943 the number of patent applications filed fell off 54%. The decline in applications filed was 41% for the ten year period 1930-1940.

By 1939 the opposition to invention had become so great that Lord

Bertrand Russell openly declared, apparently without contradiction at the University of Chicago Round Table Discussion Broadcast over the Red Network on Sunday, January 15, 1939:

Instead of encouraging inventors, we shall have to punish them. The time will come when every inventor will have to be put to death.

And yet the eminent clergyman, Henry Ward Beecher, had said,

A tool is but the extension of a man's hand, and a machine is a complex tool, and he that invents a machine augments the power of man and the well being of mankind.

The loss to society if invention were no longer encouraged would be well nigh incalculable. But even more far-reaching would be the tendency to diminish respect for property rights of all kinds. Any trend toward weakening the inventor's seventeen-year property right in his invention by throwing handicaps in the way of obtaining, enforcing or utilizing his patent would represent a deterioration or destruction of not merely one form of property. The contagion of such a trend would soon spread to other forms of property rights. With no way of converting work and labor into an asset, neither labor rights nor property rights would have any practical existence. There would be nothing for the lawyer to protect, to win, or defend for his client. The twilight of the legal profession would be at hand.

Inter-American Bar Association

Santiago, Chile, will be the scene of the fourth conference of the Inter-American Bar Association which will open its nine-day meeting there on October 20, 1945. The program of the Conference includes an official visit to His Excellency, the President of the Republic of Chile. There will also be a reception given by the Supreme Court of Chile in honor of the delegates and a ceremony in honor of the distinguished Chilean author and patriot, Don Andres Bello. Seventeen committees and sections will hold meetings from Monday through

Thursday and the results of their work will be considered by the Resolutions Committee and by the Council on Friday, October 26. The closing plenary session will be held on Saturday and the delegates will then take a two-day trip to Valparaiso and to Vina del Mar.

President David A. Simmons will be chairman of a delegation of lawyers from the American Bar Association which will include George Maurice Morris, former President of the Association, who is chairman of the Executive Committee of

the Inter-American Bar Association, and Mitchell B. Carroll, chairman of the American Bar Association's Section of International and Comparative Law. Charles Ruzicka of Baltimore, Maryland, is chairman of the Section's Committee on Cooperation with the Inter-American Bar Association which consists of twenty-eight members who are actively interested in Latin-American law. Information regarding the Conference may be obtained from the headquarters of the organization in the Southern Building, Washington 5, D. C.

Tax Notes

Prepared by Committee on Publications, Section of Taxation: Mark H. Johnson, Chairman, New York City, William A. Blakely, Dallas, Texas, Howard O. Colgan and Martin Roeder, New York City, Allen Gartner, Washington, D. C., and Edward P. Madigan, Chicago.

New Tax Course in National Program

Current Problems in Federal Taxation, a new practical course describing the expert's techniques in handling typical tax problems, has been added to the national tax program sponsored by the Section of Taxation and the Practising Law Institute. An earlier series of monographs on Fundamentals of Federal Taxation emphasized the rules of law. The new articles on Current Problems discuss the day-to-day tax problems of clients which arise in their business affairs, investments and personal estate. They have been prepared by twelve outstanding tax experts under the editorship of Erwin N. Griswold, Professor of Law at Harvard University; Roswell Magill, Professor of Law at Columbia University; Harold P. Seligson, Director of the Practising Law Institute; and Weston Vernon, Jr., representing the American Bar Association.

The titles of the articles in the new series are: Estate Planning; Form of Business Organization and the Tax Laws; Organization of Corporations and Sales of Assets; Corporate Reorganizations and Readjustments; Expense Deductions of Corporations; Special Relief under the Excess Profits Tax—Section 722; Preparation and Trial of Tax Cases; Income Taxes and Real Estate; Tax Problems of Farmers; Pension, Stock Bonus and Profit-Sharing Plans; Valuation Problems and Tax Planning. The subscription fee for the complete series of monographs on Current Problems, which is being

issued in the form of twelve pocket-size pamphlets totaling more than 700 pages, is \$12.50. Subscriptions should be sent to the Practising Law Institute, 160 Broadway, New York 7, N. Y.

In addition to the publications, the national program includes two twelve-lecture courses on Fundamentals of Federal Taxation and Current Problems in Federal Taxation which are being conducted throughout the country in cooperation with state and local bar associations and law schools. Since the fall of 1943, the basic course on Fundamentals of Federal Taxation has been attended by 3,600 lawyers in thirty-two cities from coast to coast. The new course on Current Problems in Federal Taxation has been conducted in Cleveland, Hartford, New York City and Pittsburgh since the beginning of the year. Both courses will be given in additional cities this fall and winter. Bar associations which desire to make this instruction available in their communities should communicate with the Practising Law Institute. The pamphlet series are distributed without additional charge to those enrolling for the courses.

Grantor as Owner of Trust Corpus

In a 2-1 decision, the Tenth Circuit has reversed a divided decision of the Tax Court under the Clifford rule. The Tax Court had held the grantor taxable upon the income of a trust in which he had a remote contingent reversion, in which he had reserved wide management

powers, and in which he had the power to accumulate income during the 15-year term of the trust or to use the income for the support or education of the beneficiaries. The Circuit Court held that the combination of these factors did not amount to "ownership" of the trust corpus by the grantor, and stated that there was no "reasonable basis" for the decision of the Tax Court. *Hall v. Com'r* (July 2, 1945), rev'g 4 T.C. 506.

Disregard of Corporate Entity

The Second Circuit has indicated that the recognition of a dummy corporation for tax purposes is controlled by the nature of its activities, whether its existence is challenged by the government or by the taxpayer. In *Paymer v. Com'r* (July 2, 1945), the issue was whether income from real estate was taxable to two corporations which had been organized to hold the property.

The court found that one of the corporations did nothing but hold the property, and held that this corporation did not have taxable income. The other corporation, however, had negotiated a loan upon its property, and the court held that this activity required the recognition of the entity for tax purposes.

Criminal Prosecution—Effect of Amended Return

The Sixth Circuit has stated the important principle that the voluntary filing of an amended return may not be used against the taxpayer in a criminal prosecution. In *Heindel v. U. S.* (C.C.A. 6, July 16, 1945), the defendants were corporate officers accused of "willfully" attempting to evade or defeat the tax of the corporation. They were convicted under a charge by the District Court judge that the filing of an amended return was an admission that the original return was "false and untrue". In a 2-1 decision, this was held to be so substantial an error as to require reversal of the conviction.

Letters to the Editors

To the Editors:

I have just received a copy of a Marine Corps release which shows that lawyers were getting into some of the hottest spots and rendering valuable services under fire in addition to their many necessary duties a little farther back. Captain Jones is a member of the American Bar Association. The release reads in part as follows:

"His law office was a foxhole on bloody Iwo Jima.

"Marine Captain Allen M. Jones of Washington, D. C., legal officer of the Fifth Marine Division, landed on Iwo Jima on D-Day and remained ashore during the entire 38-day campaign.

"Jones was as surprised at the number of Marines who wanted legal advice in the course of battle as the leathernecks were to find that the advice was available. The officer was called upon to draw up wills, transfer insurance, initiate divorce action, settle estates and handle assorted personal problems.

"During the first few days on Iwo, things were so hot that neither Jones nor anyone else on the island had time for legal matters. . . . But when sections of the battered island were secured by fighting leathernecks, Jones' law practice did a rushing business. He was busy at all hours of the night and day. 'I couldn't help but be amazed', he said, 'by the number of men who tramped through dangerous territory to look up the legal officer. One Marine came to me worried almost to death by a question of custody of his child. He was surprised to learn that there was a legal officer ashore. Other men who had faced death every hour would come to my foxhole, dirty and tired, and would ask their legal and personal questions. Then, they would thank me and trudge back to the front.

"These men, who in the midst of

danger, worried about the welfare of their families at home, exemplified the meaning of unselfishness, Jones said." ERRETT G. SMITH
Washington, D. C.

To the Editors:

In your "Review of Recent Supreme Court Decisions," July issue of JOURNAL, page 356, referring to the case of *Esenwein v. Commonwealth*, U. S. Supreme Court, you state that the case originated in Las Vegas, New Mexico, etc. That is a mistake, it was Las Vegas, Nevada, as New Mexico required actual residence in good faith for at least one year immediately prior to filing complaint.

Nevada's usurpation of the name "Las Vegas" has caused no end of confusion, both in mail, express, telegrams, etc. Las Vegas, New Mexico, was established before the year 1835 when the Las Vegas Grant was made by Mexico, and of course has prior right to its name.

A. T. ROGERS, JR.

Las Vegas, New Mexico

To the Editors:

Inclosed please find check in the amount of \$2.00 to cover cost of binder for American Bar Association Journal issues and Law Office Organization. Your courtesy in this matter is appreciated.

May I take this opportunity to thank you for the excellent JOURNALS which have of late been growing (if possible) in value. The fine coverage of the international situation has been splendid and especially gratifying to one away from home and the usual law association contacts.

E. B. Fox

Ens. USCGR (W)

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COMMUNITY PROPERTY AND TAXES, by Charles B. Collins, first published April 16, 1945; supplemented to June 10, 1945, 319 pages with index; bound in brown vellum. Address request for free examination, postage prepaid, to FEDERAL LAW BOOK COMPANY, P. O. Box 709, Berkeley, Calif.

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